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EDITOR'S NOTE

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ocketed:
ecember 16, 1985

ide:
85-1022

Title: R. J. Reynolds Tobacco Company, Appellant
v.
Durham County, North Carolina and Forsyth County, North Carolina and Its Affected Municipalities

Court: Supreme Court of North Carolina

Counsel for appellant: Griswold, Erwin N., Phillips, Carter G.

Counsel for appellee: Wolfe III, John G., Kitchen, S. C., Price Jr., P. Eugene, Lee, Rex E.

| ntry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Dec 16 1985 | G | Statement as to jurisdiction filed. |
| 2 | Jan 15 1986 | | Motion of appellees Durham, NC, et al. to dismiss or affirm filed. VIDED. |
| 3 | Jan 17 1986 | | Motion of appellee Forsyth County, N.C. to dismiss or affirm filed. VIDED. |
| 4 | Jan 22 1986 | | DISTRIBUTED. February 21, 1986 |
| 5 | Jan 22 1986 | | REDISTRIBUTED. February 21, 1986 |
| 6 | Jan 31 1986 | X | Reply brief of appellant R. J. Reynolds Tobacco Co. filed. VIDED. |
| 7 | Feb 24 1986 | | Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits. The case is consolidated with 85-1022, and a total of one hour is allotted for oral argument. |
| | | | ********** |
| 8 | Mar 18 1986 | | Record filed. |
| 9 | Mar 20 1986 | | Record filed. |
| 10 | Mar 20 1986 | | Certified copy of record received from Court of Appeal of North Carolina. |
| 12 | Apr 8 1986 | | Order extending time to file brief of appellant on the merits until April 15, 1986. |
| 13 | Apr 10 1986 | | Joint appendix filed. VIDED. |
| 15 | Apr 10 1986 | | Brief of appellant R. J. Reynolds Tobacco Co. filed. VIDED. |
| 17 | Apr 18 1986 | | Order extending time to file brief of appellee on the merits until June 12, 1986. |
| 18 | Jun 12 1986 | | Brief amicus curiae of Natl. Association of Counties, et al. filed. VIDED. |
| 19 | Jun 12 1986 | | Brief of appellees Durham County, NC, et al. filed. VIDED. |
| 20 | Jul 16 1986 | | Reply brief of appellant R. J. Reynolds Tobacco Co. filed. VIDED. |
| 21 | Jul 25 1986 | | CIRCULATED. |
| 22 | Jul 28 1986 | | SET FOR ARGUMENT. Monday, October 6, 1986. (2nd case) This case is consolidated with No. 85-1022. (1 hour). |
| 23 | Oct 6 1986 | | ARGUED. |

11-8

# JURISDICTIONAL

# STATEMENT

85-1021

No.

FILED

DEC 16 1985

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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R. J. REYNOLDS TOBACCO COMPANY,
*Appellant,*

v.

DURHAM COUNTY, NORTH CAROLINA and
FORSYTH COUNTY, NORTH CAROLINA
and ITS AFFECTED MUNICIPALITIES,
*Appellees.*

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**On Appeal from the Supreme Court of North Carolina**

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## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

1. Whether a state is pre-empted from levying an ad valorem property tax on goods brought in from a foreign country and stored in a customs bonded warehouse, particularly in view of the decision of this Court in *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982), and the legislative history surrounding the Trade and Tariff Act of 1984.

2. Whether the Due Process Clause or the Import-Export Clause prohibits a state from levying an ad valorem property tax on goods brought in from a foreign country and stored in a customs bonded warehouse.

## STATEMENT UNDER RULE 15.1

Forsyth County entered an appearance in the court below on behalf of itself and "its affected municipalities." The "affected municipalities" include the City of Winston-Salem, North Carolina and the Town of Kernersville, North Carolina. The Town of Kernersville, North Carolina also appeared as a separate party in the court below. The City of Durham, North Carolina appeared as an *amicus* in the court below.

## STATEMENT UNDER RULE 28.1

R. J. Reynolds Tobacco Company ["Reynolds"] is a wholly-owned, first-tier subsidiary of R. J. Reynolds Industries, Inc. ["Reynolds Industries"], a publicly-held corporation. All domestic subsidiaries and affiliates of Reynolds, except for Combibloc, a joint venture with Jagenberg AG, are wholly-owned, directly or indirectly, by either Reynolds or Reynolds Industries. With regard to its foreign subsidiaries and affiliates, there are seventy-seven such subsidiaries or affiliates which are not wholly-owned, either directly or indirectly, by Reynolds or Reynolds Industries. These are set forth in Appendix M, pp. 101a-102a.

## STATEMENT UNDER RULE 28.4

This appeal raises the question of the validity of a North Carolina statute, as applied. Thus, 28 U.S.C. § 2403(b) may be applicable to this proceeding. A copy of this Jurisdictional Statement has been served on the Attorney General of North Carolina.

## TABLE OF CONTENTS



The Appendix to this Jurisdictional Statement is separately bound.

## TABLE OF AUTHORITIES





## TABLE OF AUTHORITIES—Continued

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IN THE

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No.

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R. J. REYNOLDS TOBACCO COMPANY,
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---

**On Appeal from the Supreme Court of North Carolina**

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## JURISDICTIONAL STATEMENT

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### DECISIONS BELOW

The Judgment Dismissing Appeal and Denying Petition for Discretionary Review of the Supreme Court of North Carolina (App. A, pp. 1a-2a) is unreported. The Opinion of the North Carolina Court of Appeals (App. C, pp. 5a-19a) is reported at 73 N.C. App. 475, 326 S.E.2d 911. The Final Decision of the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review (App. D, pp. 21a-37a) is unreported.

## JURISDICTION

The judgment of the Supreme Court of North Carolina, dismissing an appeal and denying a petition for discretionary review, was entered on October 2, 1985 (App. A, pp. 1a-2a). A notice of appeal from the judgment of the Supreme Court of North Carolina (App. E, p. 39a) was filed in the Supreme Court of North Carolina on November 14, 1985. A copy of that notice of appeal was also filed on the same day in the North Carolina Court of Appeals, it being the court possessed of the record.

This appeal was docketed within 90 days from the judgment of the Supreme Court of North Carolina.[1] The jurisdiction of this Court rests on 28 U.S.C. § 1257(2). The validity of a state statute,[2] as applied, has been drawn into question on the grounds of being repugnant to the United States Constitution, and the statute has been found to be valid, as applied, by the highest court of the State.

In two recent cases, the Court clearly established its jurisdiction over the issues raised here. In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), the Court held:

> In this case, appellants drew in question the validity of California's ad valorem property tax, contending that the tax, as applied to their containers, was repugnant to the Commerce Cl..se and various treaties, and the California Supreme Court sustained the validity of the tax. Under these circumstances, this Court's appellate jurisdiction would seem manifest.
>
> . . . Appellants squarely challenged the constitutionality of the tax statute, as applied, and the California Supreme Court just as squarely sustained its validity, as applied. We have held consistently that a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that

[1] Reynolds has also docketed an appeal from the judgment of the North Carolina Court of Appeals by concurrently filing a separate Jurisdictional Statement in support of that appeal which is identical in substance to this Jurisdictional Statement. Reynolds has taken this precaution because uncertainty exists as to whether or not the judgment of the Supreme Court of North Carolina, dismissing an appeal of right filed pursuant to *N.C. Gen. Stat.* § 7A-30 and docketed pursuant to *N.C. App. R.* 14(c)(2), for lack of a substantial constitutional question, is a decision on the merits.

This Court has previously held that when an appeal of right is dismissed by a state supreme court for lack of a substantial constitutional question, the dismissal results in a "decision on the merits." *Hetrick v. Village of Lindsey*, 265 U.S. 384, 386 (1924); *Matthews v. Huwe, Treasurer*, 269 U.S. 262 (1925); *Tumey v. Ohio*, 273 U.S. 510, 515 (1927) and *Van Huffel v. Harkelrode, Treasurer*, 284 U.S. 225, 230-231 (1931). Reynolds has been advised, however, by the Clerk of the North Carolina Supreme Court that a judgment dismissing an appeal of right for lack of a substantial constitutional question is not regarded by that Court as a decision on the merits.

That the judgment of the North Carolina Supreme Court was not a decision on the merits appears to have been decided by this Court in *Doyle v. Ohio*, 426 U.S. 610 (1976), where the entry of the Supreme Court of Ohio reflected essentially the same action taken by the North Carolina Supreme Court here. (*See*, pp. 68 and 70 of the Joint Appendix in *Doyle v. Ohio*, No. 75-5014, October Term, 1975.) The only difference is that the Rules of Practice for the Supreme Court of Ohio state that the record shall not be transmitted by the clerk of the court of appeals "unless and until the court has overruled the motion to dismiss [the appeal]." Section 9, Rule II, Rules of Practice of the Supreme Court of Ohio.

Reynolds seeks to protect its right to a full plenary consideration by this Court of the questions presented in this appeal in the event that jurisdiction is no longer governed by *Hetrick* and its progeny. Accordingly, it has docketed the alternative appeal.

[2] The state statute in issue is North Carolina's statute imposing an ad valorem personal property tax. *N.C. Gen. Stat.* § 105-274. The tax has been levied here on imported goods stored in customs bonded warehouses situated in North Carolina, notwithstanding a claim by the owner that such goods are constitutionally immune from the tax.

such application is invalid on federal grounds. [citations omitted] We conclude that we have appellate jurisdiction of this case.

*Id.* at 440-441. The Court in *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982), found jurisdiction under circumstances almost identical to those in this case. In *Xerox*, the Court accepted jurisdiction to review a Texas court decision reversing an injunction against the assessment of ad valorem personal property taxes on goods stored under bond in a customs warehouse. The Court found jurisdiction, noting that "an indispensable predicate" to the Texas court decision "was a determination that the taxes at issue were permissible under the United States Constitution." *Id.* at 149.[3]

[3] *American Smelting & Refining Co. v. County of Contra Costa*, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570 (1969), *appeal dismissed*, 396 U.S. 273, *reh'g denied*, 397 U.S. 958 (1970), was not involved in *Japan Line*. It was cited in appellee's motion to dismiss in *Xerox*, but was not referred to by this Court. It does not appear to have continuing validity after this Court's decisions in *Japan Line* and *Xerox*.





## CONSTITUTIONAL PROVISIONS INVOLVED

*United States Constitution, Article I, Section 8, Clause 1*

The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises. . . .

*United States Constitution, Article I, Section 8, Clause 3*

[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

*United States Constitution, Article I, Section 10, Clause 2*

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws. . . .

*United States Constitution, Article VI, Clause 2*

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*United States Constitution, Amendment XIV, Section 1*

No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

## STATUTES AND REGULATIONS INVOLVED

The statutes involved are set forth in Appendix I, pp. 61a-72a; the regulations involved are set forth in Appendix L, pp. 73a-100a.

## STATEMENT

This is an appeal by Reynolds challenging the constitutionality of North Carolina's ad valorem personal prop-

erty tax levied for the 1983 tax year on imported tobacco stored in customs bonded warehouses. The North Carolina courts rejected Reynolds' argument that its claim of immunity from taxation is squarely governed by this Court's recent decision in *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982), which held that Congress has pre-empted the right of states to levy property taxes on goods stored in customs bonded warehouses.

Reynolds is a New Jersey corporation authorized to do business in North Carolina. It is engaged in the business of manufacturing finished tobacco products, which it sells to wholesale distributors and other authorized purchasers in the United States. In addition, a portion of its finished tobacco products are exported to purchasers in foreign countries.

Reynolds uses tobacco grown both in the United States and in foreign countries in manufacturing its finished tobacco products. The foreign tobacco used in this process is placed under customs bond at the various ports of entry. Thereafter, it is shipped either to Durham County or Forsyth County, North Carolina, by customs bonded carriers, and is placed in customs bonded warehouses owned by Reynolds.[4] The imported tobacco is usually held in the customs bonded warehouses for about two years before being withdrawn by Reynolds for use in its manufacturing operations. At the time of withdrawal, Reynolds pays the applicable duty.

On the tax lien date for the 1983 tax year, Reynolds owned imported tobacco which was stored in the customs bonded warehouses located in both Durham and Forsyth Counties. In listing its taxable personal property, Reynolds claimed that the imported tobacco situated in the customs bonded warehouses in both counties was immune

[4] The warehouses and the land on which they are situated are subject to ad valorem taxes levied on real property in North Carolina. These taxes have been paid and are not in issue here.



from taxation on federal constitutional grounds in accordance with the decision of this Court in *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982). The separate claims of immunity were denied by the respective tax supervisors (assessors) of Durham County and Forsyth County. The denials were subsequently affirmed by the board of equalization and review for each county.

Reynolds, thereafter, filed separate appeals (which were consolidated for hearing) with the North Carolina Property Tax Commission claiming that the imported tobacco stored under bond in the customs warehouses in each county was immune, under several clauses of the Constitution of the United States, from the North Carolina property tax. Reynolds' claims of immunity from ad valorem personal property taxes were denied by the North Carolina Property Tax Commission (App. D, pp. 34a-37a). Reynolds then appealed to the North Carolina Court of Appeals. In affirming the decision of the North Carolina Property Tax Commission, the Court of Appeals concluded that a nondiscriminatory ad valorem personal property tax levied on "imported goods" stored under bond in a customs warehouse, which goods are "not destined for foreign markets," is not proscribed by the Supremacy Clause, the Import-Export Clause, the Foreign Commerce Clause or the Due Process Clause of the United States Constitution (App. C, p. 16a).

Reynolds next appealed to the Supreme Court of North Carolina, claiming that the denial of immunity from taxation violated the Supremacy Clause, the Foreign Commerce Clause, the Import-Export Clause and the Due Process Clause of the United States Constitution. The appeal was dismissed without opinion for lack of a substantial constitutional question and a petition for discretionary review of the decision of the North Carolina Court of Appeals was concurrently denied (App. A, pp. 1a-2a).

## GROUNDS FOR PLENARY CONSIDERATION

The questions presented are substantial.

### I. THIS COURT DETERMINED IN THE 1982 XEROX CASE THAT CONGRESS PRE-EMPTED STATE TAXATION OF IMPORTED PROPERTY STORED IN CUSTOMS BONDED WAREHOUSES. CONGRESS SUBSEQUENTLY APPROVED THE XEROX DECISION WHEN IT ENACTED THE TRADE AND TARIFF ACT OF 1984.

In *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982), this Court was asked to decide whether it was constitutionally permissible for a state to impose an ad valorem property tax on personal property stored under bond in a customs warehouse. In deciding the question, the Court noted that Congress had, in the exercise of "its powers under the Commerce Clause, . . . established a comprehensive customs system which includes provisions for Government-supervised bonded warehouses where imports may be stored duty free for prescribed periods."[5] *Id.* at 150. This Court specifically held in its opinion that:

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[5] The Tariff Act of 1930, and the Regulations promulgated thereunder, set forth a comprehensive scheme regulating goods brought into the United States. Ch. 497, 46 Stat. 590 (1930), codified as amended at 19 U.S.C. §§ 1202-1677g (1982); 19 C.F.R. §§ 4-355.50 (1983). As part of the regulation of the importation process, the statutes and regulations specify the process whereby goods are maintained in customs custody before customs entry into the United States. The role of customs warehouses in this comprehensive scheme dates to the Warehousing Act of 1846, ch. 84, 9 Stat. 53. *Xerox*, 459 U.S. at 150.

The regulation of the process whereby goods are unloaded from vessels, placed in customs bond, transported to the bonded warehouse, and stored therein is extensive. Control by customs officials is assured by elaborate documentation and audit procedures. All goods under customs bond are required by law to be segregated from other property and, unless specifically authorized by law, the goods are neither commingled with other goods, domestic or imported, nor manipulated while in bond. *See, e.g.*, 19 U.S.C. §§ 1555-1565 (1982), 19 C.F.R. §§ 19.1-19.49 (1983).

There are eight classes of customs warehouses. Involved in this case are Class 2 and Class 8 customs warehouses. Class 2 warehouses are *private* bonded warehouses used exclusively for the storage of merchandise belonging or consigned to the proprietor thereof. 19 C.F.R. § 19.1(a)(2) (1983). Class 8 warehouses are bonded warehouses established for the purpose of cleaning, sorting, repacking or otherwise changing in condition, but not manufacturing, merchandise, under customs supervision and at the expense of the proprietor. 19 C.F.R. § 19.1(a)(8) (1983). Goods in Class 8 customs bonded warehouses may be manipulated only to the extent permitted by law with the prior approval of customs. 19 C.F.R. § 19.11(d) (1983).

At the request of the owner, however, goods may be destroyed in bond and no duty is payable thereon. 19 U.S.C. § 1557(c) (1982). Merchandise may be withdrawn for either consumption or export within five years. 19 U.S.C. § 1557(a) (1982). Withdrawal for consumption within the customs territory of the United States, or withdrawal for export, if desired, have always been equally available options for the owner of goods stored in Class 2 and Class 8 customs warehouses. No duty is payable if goods are withdrawn for export.

[6] A Class 3 customs warehouse is a privately-owned *public* bonded warehouse used exclusively for the storage of merchandise of foreign origin held under bond until removed for domestic consumption or export. 19 C.F.R. § 19.1(a)(3) (1983).



> [S]tate property taxes on goods stored under bond in a customs warehouse are pre-empted by Congress' comprehensive regulation of customs duties.

*Id.* at 154.

Although the specific property in issue in *Xerox* was finished goods imported and stored under bond in a Class 3 customs warehouse[6] with reexport expected, though not required, this Court did not limit the scope of its holding to property stored under bond while awaiting reexport. Nonetheless, the North Carolina Court of Appeals concluded that the decision in the *Xerox* case does not control the taxability of imported goods stored under bond

in a customs warehouse pending withdrawal for expected, though not required, domestic use or sale. This is clearly an incorrect reading of the *Xerox* decision. The opinion in *Xerox* specifically states that the "question" considered by the Court included "goods [stored under bond] destined for American consumption."[7]

In its *Xerox* opinion, this Court examined the legislative history of the Warehousing Act of 1846 and stated that:

> Congress was willing to waive all duty on goods that were reexported from the warehouse, *and to defer*, for a prescribed period, *the duty on goods destined for American consumption*. . . .
>
> . . . The question is whether it would be compatible with the comprehensive scheme Congress enacted to effect these goals if the states were free to tax *such goods* [referring, in part, to "goods destined for American consumption"] while they were lodged temporarily in Government-regulated bonded storage in this country.

*Id.* at 151; emphasis and bracketed matter added.

The Court, in deciding the "question," also noted that it had previously considered the issue of pre-emption from state taxation in *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940). The Court stated in *Xerox* that its "analysis in *McGoldrick* applies with full force here." 459 U.S. at 153. The Court then concluded that:

> Although there are factual distinctions between this case and *McGoldrick*, they are distinctions without a legal difference. We can discern no relevance to the issue of congressional intent in the fact that the fuel oil in *McGoldrick* could be sold only as ships' stores whereas Xerox had the option to pay the duty and withdraw the copiers for domestic sale. . . .

459 U.S. at 153.

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[7] *Xerox*, 459 U.S. at 151.



The questioning of both counsel during oral argument in the *Xerox* case also clearly indicates that the ultimate destination of the stored goods was of no consequence to the issue presented to the Court. The following question was posed by the Court to counsel for the taxing authorities:

> Question: So it really doesn't make any difference in this case as to whether they were destined for a foreign market.
>
> Ms. Chapman: Absolutely not.[8]

A similar question to counsel for Xerox followed:

> Question: Well, is an importer who says, yes, these are going to be sold in the United States, and he puts them in a bonded warehouse, and holds them for two years, may Texas levy a tax while they are in the warehouse?
>
> Mr. Hoddinott: No, sir, that is directly opposed to the legislative purpose of the Warehousing Act.[9]

Clearly, it was the pervasive and comprehensive scheme enacted by Congress governing property in customs warehouses, and *not* the ultimate destination of such property, that led this Court to conclude in *Xerox* that states are pre-empted from imposing ad valorem property taxes on goods stored under bond in a customs warehouse.[10]

**Ratification of Xerox by Congress**

Congress expressed its approval of this Court's holding in the *Xerox* case when it adopted the Trade and Tariff

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[8] Transcript of Oral Argument in *Xerox* case at p. 36 (App. G, p. 46a).

[9] Transcript of Oral Argument in *Xerox* case at pp. 48-49 (App. G, p. 47a).

[10] The North Carolina Court of Appeals relied upon *American Smelting & Refining Co. v. County of Contra Costa*, 271 Cal. App.

Act of 1984,[11] which, *inter alia*, amended the Foreign Trade Zone Act[12] to provide a statutory exemption[13] from state and local ad valorem property taxes. This amendment was prompted, in part, by Congressional awareness that the State of Texas had forced Xerox Corporation to undertake protracted litigation in order to obtain immunity from state taxation for its property

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2d 437, 77 Cal. Rptr. 570 (1969), *appeal dismissed*, 396 U.S. 273, *reh'g denied*, 397 U.S. 958 (1970). *American Smelting* involved a Class 7 customs bonded warehouse where ore was smelted under bond for either domestic consumption or shipment abroad. The California Court of Appeals in *American Smelting*, unlike this Court in *Xerox*, did not examine the legislative history of the customs bonded warehouse provisions, and interpreted *McGoldrick* to apply only to situations where goods are required by law or regulation to be shipped abroad.

[11] Pub. L. No. 98-573, 98 Stat. 2948 (1984).

[12] Ch. 590, 48 Stat. 998 (1934), codified as amended 19 U.S.C. § 81 a-u (1982). Goods imported into foreign trade zones, as in the case of customs bonded warehouses, are not subject to import duties until withdrawn for domestic consumption. 19 U.S.C. § 81c (1982). Unlike customs bonded warehouses, however, there are no separate classes of foreign trade zones, and manipulation, manufacturing and exhibition are generally permitted subject to customs supervision. 19 C.F.R. § 146.32 (1983).

[13] Pub. L. No. 98-573, Sec. 231(b), 98 Stat. 2948, 2991 (1984) provides:

> (1) Section 15 of such Act of June 18, 1934 (19 U.S.C. 81o) is amended by adding at the end thereof the following new subsection:
>
> "(e) Tangible personal property imported from outside the United States and held in a zone for the purpose of storage, sale, exhibition, repackaging, assembly, distribution, sorting, grading, cleaning, mixing, display, manufacturing, or processing, and tangible personal property produced in the United States and held in a zone for exportation, either in its original form or as altered by any of the above processes, shall be exempt from State and local ad valorem taxation."
>
> (2) The amendment made by paragraph (1) shall take effect on January 1, 1983.



stored in a customs bonded warehouse. The legislative history surrounding this amendment clearly indicates that Congress was not making a substantive change in the law governing the state taxation of property in foreign trade zones. Rather, Congress made it clear that property situated in a foreign trade zone was to be afforded the same constitutional immunity from state ad valorem property taxes which the Court, in *Xerox*, had afforded property in a customs bonded warehouse.

Congressman Wright, sponsor of H.R. 717 explained the rationale for the bill in testimony (App. H, 49a-51a) before the Subcommittee on Trade:

> Now, there is only one case that I am aware of anywhere in the whole United States where a local taxing authority, a local city has presumed a right to levy local ad valorem taxes on goods in foreign commerce, the inventories in the foreign trade zone, and that, as luck would have it, occurred in my district, at the Dallas-Fort Worth Foreign Trade Zone, where the city of Irving, composed of some very fine Texas citizens, simply misunderstood the nature of a foreign trade zone and undertook to levy local ad valorem taxes on all the inventories that are there in the foreign trade zones.
>
> Well, it occurs that a recent Supreme Court decision in the case of Xerox versus the County of Harris already has ruled that you cannot do that with respect to a bonded warehouse, and I should think that the very same identical provision would apply here.[14]

Senator Tower, cosponsor of S. 1411, a companion bill to H.R. 717, in a statement (App. I, pp. 53a-54a) for the record explained the rationale for the bill as follows:

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[14] Certain Trade and Tariff Bills, Hearings before the Subcomm. on Trade of the House Comm. on Ways and Means, 98th Cong., 1st Sess. 330 (1983) (statement of Rep. Wright).

Congress created foreign trade zones to make our country competitive in the international marketplace. Local taxation of goods located in a foreign trade zone would, of course, frustrate the Congressional purpose. The Federal preemption of this type of taxation has been uniformly recognized outside of Texas. However, because of restrictions in the Texas constitution, the formal recognition by the State of Texas is not possible.

The lack of a definitive statute in Texas has created a hesitation among businesses that might otherwise use Texas foreign trade zones. A State statute is, of course, not necessary to restate a Federal preemption. A State statute would be merely gratuitous, to insure that local authorities comply with Federal law. Without such a statute to show local assessors, however, businesses are concerned that they will be forced to go to court in order to secure an ad valorem tax exemption to which they are entitled. Although the recent U.S. Supreme Court case of Xerox Corporation against Harris County seems to make the state of the law clear, businesses do not like to operate based on how case law would help them if they are forced to go to court.

> By simply restating the existing Federal preemption of ad valorem taxation, the Bentsen-Tower bill will be able to facilitate the development of foreign trade zones.[15]

Further evidence that Congress intended to approve the pre-emption recognized in *Xerox* is found in H. Rep. No. 267, 98th Cong., 1st Sess. 35 (App. J, pp. 55a-56a) stating that "[t]he goal of this legislation is . . . to confirm that Congress intended not to permit the imposition of [state and local ad valorem] taxes" on imported property in a

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[15] 129 Cong. Rec. S7748-49 (daily ed. June 6, 1983) (statement of Sen. Tower); *see also* Miscellaneous Tariff Bills, 1983-84, Hearings before the Subcomm. on Int'l Trade of the Comm. on Finance, 98th Cong., 1st Sess. 355 (1983) (statement of Sen. Tower).



foreign trade zone, and S. Rep. No. 308, 98th Cong., 1st Sess. 36 (App. K, pp. 57a-59a) stating that "the Supreme Court of the United States has ruled that Congress' comprehensive regulation of customs duties preempts state property taxes on goods stored under bond in a customs warehouse (*Xerox Corp. v. County of Harris, Texas, and City of Houston, Texas*, No. 81-1489, December 13, 1982)."

It is clear that Congress has pre-empted the states' right to tax imported property stored under bond in a customs warehouse. This Court so stated in *Xerox*. Moreover, Congress reaffirmed this fact in the exercise of its authority under the Commerce Clause, by confirming the *Xerox* decision when enacting the Trade and Tariff Act of 1984.

## II. THE DUE PROCESS CLAUSE AND THE IMPORT-EXPORT CLAUSE PROHIBIT A STATE FROM LEVYING AN AD VALOREM PROPERTY TAX ON IMPORTED GOODS STORED IN A CUSTOMS BONDED WAREHOUSE.

Reynolds separately argued in its appeals to the courts below that the ad valorem property taxes levied on its imported goods stored in customs bonded warehouses violated both the Due Process Clause and the Import-Export Clause of the United States Constitution. The North Carolina Court of Appeals denied both claims. This Court has never considered either question in a written opinion.[16]

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[16] This Court was not asked to consider a Due Process argument in *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982). Nor was a Due Process argument raised in *American Smelting & Refining Co. v. County of Contra Costa*, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570 (1969), *appeal dismissed*, 396 U.S. 273, *reh'g denied*, 397 U.S. 958 (1970). This Court found it "unnecessary . . . to consider" whether the Texas property tax involved in *Xerox* would "pass muster" under the Import-Export Clause. 459 U.S. at 154. An identical conclusion was stated with regard to the excise tax involved in *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 429 (1940).

In *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905), this Court stated that "[i]t is . . . essential to the validity . . . [of an ad valorem property] tax that the property [sought to be taxed] . . . be within the territorial jurisdiction of the taxing power." *Id.* at 204. Later, in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, *reh'g denied*, 424 U.S. 935 (1976), where no customs bonded warehouse was involved, the Court held that a "nondiscriminatory property tax" levied on goods "no longer in transit" was not proscribed by the Import-Export Clause of the United States Constitution. *Id.* at 302. Clearly, a state is without authority to levy an otherwise valid ad valorem property tax if the property sought to be taxed is not legally within the taxing jurisdiction.

This Court has consistently recognized in prior cases that as long as imported property is stored under bond in a customs warehouse, it is outside the taxing jurisdiction of the individual states and the District of Columbia. In *Fabbri v. Murphy*, 95 U.S. 191 (1877), the Court stated that "Congress did not regard the importation as complete while the goods remained in the custody of the proper officers of the customs." *Id.* at 197-198. More recently, in *Xerox Corp. v. County of Harris*, 459 U.S. 145, 153-154 (1982), this Court cited with approval the decision in *District of Columbia v. International Distributing Corp.*, 118 U.S. App. D.C. 71, 331 F.2d 817 (1964). The Court of Appeals there held that an excise tax could not be levied on the sale of alcoholic beverages stored in a customs bonded warehouse when the sale was consummated while the goods were in the bonded warehouse. In reaching this conclusion, the court approved the rationale, stated by the D.C. Tax Court in its opinion, that:

> "The idea of bonded warehouses and their use by the United States custom authorities negatives the proposition that at the time of sale the alcoholic bev-



> erages were in the possession of the petitioner [the corporation]. True it is that the private bonded warehouse was physically in the District of Columbia; and the liquors were stored therein; and in that sense they were in the District. In law, however, they were still without that jurisdiction, and did not become subject thereto until they had been withdrawn from the private bonded warehouse and removed from the control of the customs official."

118 U.S. App. D.C. at 73-74, 331 F.2d at 819-820. *See also Ammex Warehouse Co. v. Department of Alcoholic Beverage Control*, 224 F. Supp. 546, 555 (S.D. Cal. 1963), *aff'd*, 378 U.S. 124 (1964), holding that goods in customs bonded warehouses "never become part of the common mass of goods in the State" and *United States v. Ehrgott*, 182 F. 267, 273 (C.C. S.D.N.Y. 1910), holding that placing imported goods under customs bond is as if they were "detained at the borders."

The conclusion of these cases that imported goods brought to a customs bonded warehouse are not within the taxing jurisdiction of the states reflects the recognition that "Congress intended to make customs bonded warehouses federal enclaves free of state taxation . . . [where] imported goods . . . [are] not subject to [the] taxing jurisdiction until they [are] removed from the warehouse." *Xerox*, 459 U.S. at 154. Accordingly, the court below erred in failing to find that imported tobacco stored under bond in customs bonded warehouses was immune from taxation under the Due Process Clause and the Import-Export Clause of the United States Constitution.

## CONCLUSION

Dismissal of this appeal would (1) open the door to the imposition by state and local governments of substantial burdens on the foreign commerce of the United States, and (2) create a rule of taxation based on intent, which oftentimes may not be known, thereby generating

a multiplicity of suits. Moreover, dismissal would substantially change the effectiveness and utility of customs bonded warehouses, limiting and perhaps destroying their usefulness in foreign commerce. This case presents a substantial federal question since it directly deals with an issue "touching the accommodation of state and federal interests under the Constitution." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974).

Probable jurisdiction should be noted. Indeed, in view of the clear failure of the court below to follow this Court's decision in *Xerox*, it would be appropriate for the Court to reverse the decision below summarily. If, however, the Court should feel that it lacks jurisdiction either to hear the case on appeal or to reverse summarily, the questions are nevertheless important, and certiorari should be granted under 28 U.S.C. § 2103.

Respectfully submitted,

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December, 1985

# APPENDIX

85-1021

85-1022

Nos.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

---

R. J. REYNOLDS TOBACCO COMPANY,
*Appellant,*

v.

DURHAM COUNTY, NORTH CAROLINA and
FORSYTH COUNTY, NORTH CAROLINA
and ITS AFFECTED MUNICIPALITIES,
*Appellees.*

---

## APPENDIX TO JURISDICTIONAL STATEMENTS ON APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA AND THE NORTH CAROLINA COURT OF APPEALS

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## APPENDIX A

**Judgment Dismissing Appeal and Denying Petition for Discretionary Review of the Supreme Court of North Carolina, October 2, 1985**

SUPREME COURT OF NORTH CAROLINA
TENTH DISTRICT

---

No. 222P85

---

IN THE MATTER OF:

THE APPEAL OF R. J. REYNOLDS TOBACCO COMPANY FROM THE DENIALS OF ITS CLAIMS FOR EXEMPTION BY DURHAM COUNTY AND FORSYTH COUNTY FOR 1983

(8410PTC481)

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[October 2, 1985]

---

JUDGMENT DISMISSING APPEAL ON MOTION OF FORSYTH & DURHAM COUNTIES AND DENYING PETITION FOR DISCRETONARY REVIEW

Upon consideration of the R. J. Reynalds Tobacco Company's notice of appeal from the North Carolina Court of Appeals, filed in this matter pursuant to G.S. 7A-30, and the Forsyth & Durham Counties' motion to dismiss the appeal for lack of a substantial constitutional question and upon consideration of the R. J. Reynolds Tobacco Company's petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals: Forsyth & Durham Counties' motion to dismiss the appeal is

> "Allowed by order of the Court in conference, this the 19th day of September 1985.
>
> s/ Billings, J.
> For the Court"

R. J. Reynolds Tobacco Company's petition for discretionary review is

> "Denied by order of the Court in conference, this the 19th day of September 1985.
>
> s/ Billings, J.
> For the Court"

Therefore, it is considered and adjudged further that R. J. Reynolds Tobacco Company do pay the sum of Nine and no/100 Dollars ($9.00) and that execution issue therefor.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of October 1985.

/s/ J. Gregory Wallace
J. GREGORY WALLACE
Clerk of the Supreme Court

Copy to:

North Carolina Court of Appeals
Horton, Hendrick & Kummer, Attorneys at Law
Mr. P. Eugene Price, Jr., Attorney at Law
Mr. Jonathan V. Maxwell, Attorney at Law
Mr. John G. Wolfe, III, Attorney at Law
Mr. S. C. Kitchen, Attorney at Law

## APPENDIX B

**Judgment of the North Carolina Court of Appeals, April 8, 1985**

COURT OF APPEALS OF NORTH CAROLINA

---

No. 8410PTC481

---

IN THE MATTER OF:

THE APPEAL OF R. J. REYNOLDS TOBACCO COMPANY FROM THE DENIALS OF ITS CLAIMS FOR EXEMPTION BY DURHAM COUNTY AND FORSYTH COUNTY FOR 1983

---

[April 8, 1985]

---

JUDGMENT

This cause came on to be argued upon the transcript of the record from the N. C. Property Tax Commission. Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said trial tribunal.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable JACK COZORT Judge, be certified to the said trial tribunal to the intent that the JUDGMENT IS AFFIRMED. And it is considered and adjudged further, that the SAID R. J. REYNOLDS TOBACCO COMPANY DO PAY the cost of the appeal in this Court incurred, to wit, the sum of ONE HUNDRED TWENTY AND NO/100 dollars ($120.00), and execution issue therefor. Certified to N. C. Property Tax Commission this 8th day of April 1985.

/s/ Francis E. Dail
Clerk of the Court of Appeals.

## APPENDIX C

**Opinion of the North Carolina Court of Appeals,**
**March 19, 1985**

NORTH CAROLINA COURT OF APPEALS

---

No. 8410PTC481

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IN THE MATTER OF:

THE APPEAL OF R. J. REYNOLDS TOBACCO COMPANY FROM THE DENIALS OF ITS CLAIMS FOR EXEMPTION BY DURHAM COUNTY AND FORSYTH COUNTY FOR 1983

---

Filed: 19 March 1985

---

*Property Tax Commission*

Appeal by R. J. Reynolds Tobacco Company from Final Decision of the Property Tax Commission entered 14 December 1983. Heard in the Court of Appeals 9 January 1985.

Horton, Hendrick & Kummer by Thomas L. Kummer and John A. Cocklereece, Jr., for R. J. Reynolds Tobacco Company, appellant.

Assistant County Attorney S. C. Kitchen for County of Durham, appellee.

P. Eugene Price, Jr., and Jonathan V. Maxwell for Forsyth County and its Affected Municipalities; and John G. Wolfe, III, for Town of Kernersville, appellees.

Assistant City Attorney Henry D. Blinder for City of Durham, Amicus Curiae.

COZORT, Judge.

R. J. Reynolds Tobacco Company appeals from an adverse decision of the Property Tax Commission. Reynolds had argued to the Commission that imported tobacco owned by Reynolds and stored in the United States customs bonded warehouses located in Durham and Forsyth Counties was excluded from ad valorem taxation. The Commission disagreed and denied Reynolds' claims for a property tax exemption. We affirm.

The basic facts are undisputed. R. J. Reynolds Tobacco Company is a New Jersey corporation qualified to do business in North Carolina with its principal offices in Winston-Salem. Reynolds manufactures in Forsyth County finished tobacco products which it sells to wholesale distributors and other authorized purchasers in the United States and abroad. Reynolds uses tobacco grown in the United States and in foreign countries in the manufacture of its tobacco products. In May and June of 1983, Reynolds appeared before the Durham County and the Forsyth County Boards of Equalization and Review, seeking a property tax exemption for imported leaf tobacco stored in customs bonded warehouses located in each county. The total tax involved is over seven million dollars for 1983.

The allegedly "exempt" tobacco had been imported from Bulgaria, Syria, Turkey, Lebanon, and Brazil. The tobacco is shipped by bonded carrier to the United States and unloaded from the carrier at a port of entry where it is placed under customs bond. A "customs bond" is a bond given by the importer at the time the tobacco is physically imported into the United States for the purpose of securing the payment of federal import duties. The tobacco is then transported by rail or truck to a storage facility where it remains under customs bond until it is withdrawn from storage.

The storage facilities used by Reynolds to hold its imported tobacco are United States customs bonded warehouses. The customs bonded warehouses and the land on which they are situated in Durham and Forsyth Counties are owned by Reynolds which is the sole user of the warehouses. The warehouses themselves and the land underlying them are subject to property taxation in both counties. In all, Reynolds has twenty-six customs bonded warehouses in Durham County and sixty-two customs bonded warehouses in Forsyth County. Imported tobacco is normally held in storage by Reynolds for two years before it is withdrawn and blended with domestically-grown tobacco in the manufacturing process. When the imported tobacco is withdrawn from bonded storage for manufacturing, customs duties are paid by Reynolds to the federal government.



Virtually all the imported tobacco stored in these customs bonded warehouses in Durham and Forsyth Counties is used by Reynolds for the domestic manufacture of finished tobacco products. Furthermore, virtually all the tobacco products manufactured by Reynolds from imported tobacco are sold and consumed in the United States.

From the denial of its claims for property tax exemption by the Durham and Forsyth Counties Boards of Equalization and Review, Reynolds appealed to the Property Tax Commission. Prior to a hearing on the matter, Durham County filed a motion to dismiss the appeal from that County's Board on the ground that Reynolds had failed to properly perfect its appeal to the Commission. The denial of this motion is the subject of Durham County's cross-assignment of error.

The Property Tax Commission held that the Durham and Forsyth Counties Boards of Equalization and Review correctly denied Reynolds claims for exemption from property taxation of imported tobacco stored as of 1 January 1983 in customs bonded warehouses.

I.

The scope of our review on appeal from a decision of the Property Tax Commission is governed by G.S. 105-345.2. *See* In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981). Section (b) of this statute lists six grounds on which an appellate court may reverse, remand, modify, or declare null and void the findings, inferences, conclusions, or decisions made by the Commission. Although in the record Reynolds has taken other exceptions, for example, to certain findings of fact, it has failed to bring them forward in its brief. Instead, Reynolds has couched its entire appeal on the ground set forth in G.S. 105-345.2(b)(1) that the Commission's conclusions of law are in "violation of constitutional provisions." Basing its argument on three constitutional grounds, Reynolds argues that imposing ad valorem property taxes on imported tobacco stored in United States customs bonded warehouses is unconstitutional. Our review of Reynolds' appeal is confined to this issue.

First, we briefly explain the concept of and purpose behind customs bonded warehouses. In order to encourage merchants here and abroad to use American ports, Congress was willing to waive all duty on goods that were reexported and to defer for a prescribed period the duty on imported goods destined for domestic consumption. *See* 19 U.S.C.A. 1557(a). To carry out this objective, Congress, pursuant to its powers under the Commerce clause, established a comprehensive customs system which created secure and duty-free enclaves or government-supervised bonded warehouses. For a five-year period, imported goods may be stored in the warehouses duty-free. If during this period the goods are withdrawn and reexported, no duty is paid. If the goods are withdrawn for American consumption or stored beyond five years, any duty owed on the goods becomes due. Xerox Corp. v. County of Harris, 459 U.S. 145, 103 S. Ct. 523, 74 L. Ed. 2d 323 (1982).



At the outset, we note three cases which guide our determination of the issue presented: Michelin Tire Corp. v. Wages, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 495, *rehearing denied*, 424 U.S. 935, 96 S. Ct. 1151, 47 L. Ed. 2d 344 (1976); Xerox v. County of Harris, *supra*; and American Smelting and Refining Co. v. County of Contra Costa, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570 (1969), *appeal dismissed for want of substantial federal question*, 396 U.S. 273, 90 S. Ct. 553, 24 L. Ed. 2d 462 (1970).

A.

The first ground asserted by Reynolds as a basis for holding unconstitutional the imposition of ad valorem taxes on its imported tobacco in Durham and Forsyth Counties is the Import-Export clause. Article I, § 10, clause 2 of the United States Constitution provides in part that "[n]o state shall, without the consent of congress, lay any imposts or duties on imports or exports." Reynolds maintains that the tobacco involved in this case is still in the import stream of commerce. It argues that because Congress has decided that goods can remain in customs bonded warehouses duty-free for five years, Congress has thereby defined the period during which goods remain in foreign commerce.

This argument is without merit. In Michelin Tire Corp. v. Wages, *supra*, county tax officials assessed Georgia ad valorem property taxes against imported tires and tubes which were included in the corporation's inventory maintained at its wholesale distribution warehouse located in the county. The U.S. Supreme Court held that Georgia's assessment of a nondiscriminatory ad valorem property tax against imported goods that were no longer in import transit did not violate the Import-Export clause, regardless of whether the goods had lost their status as imports by being mingled with other goods of the importer. *Id.* at 279, 96 S. Ct. at

538, 46 L. Ed. 2d at 499-500. This decision expressly overruled Low v. Austin, 13 Wall 29, 20 L. Ed. 517 (1872), which had held that the states were prohibited by the Import-Export clause from imposing a nondiscriminatory ad valorem property tax on imported goods until they have lost their character as imports and have become incorporated into the mass of property in the state. *Id.* at 279, 282, 96 S. Ct. at 538, 539, 46 L. Ed. 2d at 500, 501. The *Michelin* decision indicates that "a state or local tax on imported goods is permissible if the goods have lost their status as imports, and that such a tax is also permissible, even if the goods have not lost their status as imports, if the tax is nondiscriminatory." Annot., 46 L. Ed. 2d 955, 967 (1977). The focus of Import-Export clause cases has therefore been changed "from the nature of the goods as imports to the nature of the tax at issue." Limbach v. Hooven & Allison Co., —— U.S. ——, 104 S. Ct. 1837, 1842, 80 L. Ed. 2d 356, 363 (1984). It is unnecessary for this Court to determine whether the imported tobacco involved in this case was "still in the import stream of commerce." Neither party disputes the fact that the property taxes levied by Durham and Forsyth Counties are nondiscriminatory. We hold that the imposition of a nondiscriminatory ad valorem property tax on Reynolds' imported tobacco located in customs bonded warehouses in Durham and Forsyth Counties is not prohibited by the Import-Export clause of the U.S. Constitution.

Two companion cases, Youngstown Sheet & Tube Co. v. Bowers and United States Plywood Corp. v. City of Algoma, 358 U.S. 534, 79 S. Ct. 383, 3 L. Ed. 2d 490 (1959), which did not have the benefit of the *Michelin* rule, saw no justification in allowing imported goods to escape a nondiscriminatory property tax. In *Youngstown*, iron ores were imported from five countries for use along with domestic ores in manufacturing at



Youngstown's Ohio plant. United States Plywood imported lumber and veneers for use as needed along with domestic wood in its manufacturing processes. The imported lumber was "green" when received and therefore had to be dried before it could be used. These facts are similar to the undisputed facts in the case *sub judice.* Some of the tobacco imported by Reynolds must be held in storage for aging purposes before it can be used in manufacturing. The remaining imported tobacco has already been aged and is ready to be blended with domestically-grown tobacco in the manufacturing operations of Reynolds in Winston-Salem. The Supreme Court concluded with regard to both *Youngstown* and *United States Plywood* as follows:

> The materials here in question were imported to supply, and were essential to supply, the manufacturer's current operating needs. When . . . they were put to that use and indiscriminate portions of the whole were actually being used to supply daily operating needs, they stood in the same relation to the State as like piles of domestic materials . . . that were kept for use and used in the same way. The one was then as fully subject to taxation as the other. In those circumstances, the tax was not on the materials because they had been imported, but because at the time of the assessment they were being used, in every practical sense, for the purposes for which they had been imported. They were therefore subject to taxation just like domestic property that was kept . . . in the same way for the same use. We cannot impute to the Framers of the Constitution a purpose to make such a discrimination in favor of materials imported from other countries as would result if we approved the views pressed upon us by the manufacturers.

Id. at 549-50, 79 S. Ct. at 392, 3 L. Ed. 2d at 500-01.

Furthermore, in In re Publishing Co., 281 N.C. 210, 188 S.E.2d 310 (1972), the North Carolina Supreme Court similarly held that imported newsprint which was kept on hand for use in connection with the taxpayer's printing operation was subject to property taxation by Buncombe County in the same manner as the domestic newsprint which was kept at the same place, in the same manner, and for the same use. Our Supreme Court concluded that the Import-Export clause did not prohibit the assessment of a nondiscriminatory ad valorem tax on imported newsprint held for use in the taxpayer's manufacturing process. We likewise hold that even though the imported tobacco involved in this case is held in customs bonded warehouses the Import-Export clause confers no immunity to it from nondiscriminatory ad valorem property taxes.

B.

A second argument proposed by Reynolds is that its imported tobacco is exempt from ad valorem property taxation under the Foreign Commerce clause and the Supremacy clause of the United States Constitution.

Article I, § 8, clause 3 of the United States Constitution states that Congress shall have the power "[t]o regulate commerce with foreign nations." Before a state tax can be declared unconstitutional, it must be shown to burden the interstate or foreign commerce involved. *See* Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 83 S. Ct. 1201, 10 L.Ed. 2d 202, *rehearing denied*, 374 U.S. 858, 83 S. Ct. 1861, 10 L. Ed. 2d 1082 (1963). Not every burden is prohibited however, only those which discriminate against the commerce. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565 (1940). *See generally*, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed.2d 326, *rehearing denied*, 430 U.S. 976, 97 S. Ct. 1669, 52 L. Ed. 2d 3711 (1977). As will be seen, because Reynolds' imported tobacco is not



forced to bear a heavier tax burden than its domestic tobacco, local ad valorem property taxation is not a discriminatory or an undue burden on foreign commerce.

The Supremacy clause, Article VI, clause 2 provides that the "[C]onstitution, and the laws of the United States which . . . shall be the supreme law of the land . . . any thing in the [C]onstitution or laws of any state to the contrary notwithstanding."

Essentially, Reynolds' argument with regard to these two clauses is that federal regulation has been so pervasive in this field that it has preempted state action. In Silkwood v. Kerr-McGee Corp., —— U.S. ——, 104 S. Ct. 615, 78 L. Ed. 2d 443, *rehearing denied*, —— U.S. ——, 104 S. Ct. 1430, 79 L. Ed. 2d 754 (1984), the U.S. Supreme Court explained that state law can be preempted in two ways. First, if Congress evidences an intent to occupy a field, any state law falling within that field is preempted. Secondly, if Congress has not entirely displaced state regulation over the matter, state law is still preempted to the extent it actually conflicts with federal law or hinders the accomplishment of the objectives of Congress. *Id.* at ——, 104 S. Ct. at 621, 78 L. Ed. 2d at 452.

In Xerox Corp. v. County of Harris *supra*, the United States Supreme Court was confronted with the question of whether a state may impose nondiscriminatory ad valorem property taxes on imported goods destined for foreign markets stored under bond in a customs warehouse. Xerox imported and stored copiers previously assembled in Mexico in customs bonded warehouses in Texas. The copiers were not designed or intended for domestic use. All of the copiers were ultimately sold abroad, allowing Xerox to avoid paying any import duties pursuant to 19 U.S.C. § 1557(a).

In determining whether Congress had evidenced an intent to preempt state action in this area, the Supreme

Court examined the legislative history and congressional purpose behind the bonded warehousing system. A forerunner of the present statute, 19 U.S.C. § 1557(a), was the Warehousing Act of 1846, 9 Stat. 53. Its objective was to help establish the United States as a center of world commerce. According to the Supreme Court, "[t]he Act stimulated foreign commerce by allowing goods in transit in foreign commerce to remain in secure storage, duty free, *until they resumed their journey in export.*" *Id.* at 150, 103 S. Ct. at 526, 74 L. Ed. 2d at 328. (Emphasis added.) Accordingly, the Supreme Court held that state property taxes on goods awaiting export stored under bond in a customs warehouse are preempted by Congress's comprehensive regulation of customs duties. The Court reasoned that it would be incompatible with the comprehensive scheme Congress enacted if the states were free to tax such goods while they were lodged temporarily in government-regulated bonded storage in this country.

However, *Xerox* is distinguishable from the case *sub judice* in one crucial respect. It is undisputed by the parties on appeal that virtually all the imported tobacco involved in this case is destined for domestic, rather than foreign, manufacture and consumption. Thus, we are faced with a different question than the U.S. Supreme Court faced in *Xerox*. While the imposition of ad valorem taxes on imported goods stored temporarily in this country prior to reexportation would make the United States a less attractive storage center and in turn contravene congressional objectives, we fail to see how the imposition of property taxes on goods not intended to be reexported would be inconsistent with the central purposes behind the establishment of customs bonded warehouses.

A case which addressed the preemption question in relation to facts similar to the present case was American Smelting and Refining Co. v. County of Contra Costa,



*supra*. In *American Smelting*, a California county levied nondiscriminatory property taxes on imported metals stored in customs bonded warehouses for eventual domestic use. The California Court of Appeals sustained the validity of the property tax on the metals held for future domestic use. In a very thorough opinion, the *American Smelting* court reasoned that the "mere incident of the time of payment of the federal duty, as controlled by the taxpayer, does not appear to be a rational criteria upon which to predicate the determination of the local government's right to tax." *Id.* at 469, 77 Cal. Rptr. at 593-94. It further stated that the law and regulations governing customs bonded warehouses do not compel the conclusion that Congress in the exercise of its power to regulate foreign commerce meant to create a warehouse enclave for foreign goods subsequently sold and consumed in domestic commerce. "All that appears is an intent to relieve the processor of the obligation to pay the duty until the refined product is actually consumed or sold in domestic commerce, and the intent to relieve him of the obligation to pay any duty if the refined product is exported." *Id.* at 470, 77 Cal. Rptr. at 594.

We agree and, like the *American Smelting* court, can find no "congressional intent [in the customs bonded warehouse scheme of legislation] to interfere with the right of the state to tax goods which have been imported for, and have been appropriated to, processing for domestic consumption, and that such right is not foreclosed because the importer-processor has withheld payment of the duty and has given a bond to secure such payment." *Id.* at 481, 77 Cal. Rptr. at 601.

Moreover, both imported and domestic tobacco generally require aging before manufacture. To exempt imported tobacco aging in customs bonded warehouses from property taxation while imposing these taxes on domestically-grown tobacco aging in ordinary warehouses would be unfair. As the *American Smelting* court observed:

> [I]t would amount to a bounty to the operator of the tideland smelter processing metal-bearing materials of foreign origin which are destined for domestic consumption, and a discrimination against operators of domestic smelters refining domestic ores which are subject to local taxation.

*Id.* at 474, 77 Cal. Rptr. at 596-97. Also, since this imported tobacco receives the same local governmental services, such as police and fire protection, as domestic tobacco, local taxpayers would be forced to provide a subsidy in excess of a million dollars to Reynolds for its imported tobacco if exempted from property taxation. The U. S. Supreme Court in *Michelin, supra,* at 289, 96 S. Ct. at 542, 46 L. Ed. 2d at 505, recognized this problem and determined that local property "taxation is the *quid pro quo* for benefits actually conferred by the taxing State. There is no reason why local taxpayers should subsidize the services used by the importer."

Therefore, we must affirm the Property Tax Commission's conclusion that nondiscriminatory ad valorem personal property taxes on imported goods stored under bond in a customs warehouse but not destined for foreign markets are not prohibited. Since such taxation is not inconsistent with *Xerox* or with the purposes behind Congress's comprehensive legislative scheme involving customs bonded warehouses, we hold State property taxation of this tobacco has not been preempted by federal regulation. Also, because this taxation is not a discriminatory burden on commerce, we hold it is similarly not prohibited by the Commerce clause.

C.

As its final constitutional argument against the imposition of ad valorem property taxes on its imported tobacco, Reynolds asserts that due process prohibits state taxation of property which is not within the State's jurisdiction. Reynolds contends that even though its



imported tobacco may be physically located in Durham and Forsyth Counties, this tobacco is not subject to the State's jurisdiction until it is withdrawn from the customs bonded warehouse and removed from the control of customs officials.

Ad valorem property taxation is governed by The Machinery Act, G.S. 105-271, *et seq.* G.S. 105-274 provides that all property—real and personal—within the jurisdiction of this State, whether owned by a foreign or domestic corporation is subject to taxation unless specifically excluded or exempted. Under *Xerox, supra,* imported goods destined for foreign markets stored temporarily in customs bonded warehouses have been excluded from local property taxation. As the above discussion reveals, imported goods destined for domestic consumption are not exempt from local property taxation. Also, our research has revealed no North Carolina law excluding the tobacco now in question from taxation. As stated in Transfer Corp. v. County of Davidson, 276 N.C. 19, 24-25, 170 S.E. 2d 873, 878 (1969):

> The test of whether a tax law violates due process is "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." Wisconsin v. J. C. Penney Co., 311 U.S. 435, 85 L. Ed. 267, 61 S. Ct. 246, 130 A.L.R. 1229 (1940).

It is undisputed in this case that the imported tobacco stored in Reynolds' customs bonded warehouses receives fire and police protection and other services by Durham and Forsyth Counties. Therefore, under a Due Process clause analysis, Reynolds' imported tobacco is subject to property taxation just like its domestic tobacco receiving the same services.

Also, even though Reynolds is technically a New Jersey corporation, its tobacco physically located in this State is subject to North Carolina taxation. In In re Plushbottom and Peabody, 51 N.C. App. 285, 289, 276 S.E.2d 505, 508, *disc. rev. denied*, 303 N.C. 314, 281 S.E.2d 653 (1981), this Court noted that although the situs of personal property for purposes of taxation is ordinarily the domicile of the owner, when

> the owner maintains said property in a jurisdiction other than that of his domicile, in the conduct of his business within such jurisdiction, the *situs* of said property for purposes of taxation is its actual *situs*, and not that of its domicile. [Citation omitted.]

The "actual situs" of the imported tobacco in question in this case is its physical location in Durham and Forsyth Counties. It is clear that a local government may tax goods, not otherwise exempted, which are receiving local services and which are physically present within the State. We hold that the imposition of ad valorem property taxes on Reynolds' imported tobacco does not violate the Due Process clause of the U. S. Constitution.

In conclusion, we hold, as reflected by the above discussions, that the imposition of ad valorem property taxes on Reynolds' imported tobacco stored in its Durham and Forsyth Counties customs bonded warehouses is constitutional under the Import-Export clause, Commerce clause, Supremacy clause, and Due Process clause of the U. S. Constitution.

II.

We also note that Durham County cross-assigned as error the Property Tax Commission's denial of its motion to dismiss Reynolds' appeal on the ground that Reynolds failed to comply with G.S. 105-324. This statute specifies that to perfect its appeal, the appellant must file a notice of appeal with the Clerk of the Board of County Commissioners and with the Property Tax Commission. In the present case, Reynolds mailed its notice to S. Bruce Mangum as Clerk of the Board of County Commissioners instead of Edmund Slade Swindell, Jr., who was in fact the Board of County Commissioners' Clerk.



We hold the Property Tax Commission properly denied Durham County's motion to dismiss. The record reveals that Reynolds properly filed its notice with the Commission. It also mailed the notice to the Durham County attorney, the Durham County Tax Supervisor, and to Mr. S. Bruce Mangum, Clerk to the Durham County Board of Commissioners, Room 206, County Judicial Building, Durham, North Carolina 27701. This notice was received by Durham County. The failure to name the proper person as Clerk of the Board of County Commissioners was a misnomer and did not preclude the Property Tax Commission from exercising jurisdiction over the matter. Also, according to the Commission, Durham County conceded that it had not been prejudiced by Reynolds' failure to directly mail a copy to Edmund Slade Swindell, Jr. We likewise fail to see how Durham County might have been prejudiced. For these reasons and those given by the Commission in its final decision, we affirm the denial of Durham County's motion to dismiss.

The decision of the Property Tax Commission in all respects is

Affirmed.

Judges ARNOLD and EAGLES concur.

## APPENDIX D

**Final Decision of North Carolina Property Tax Commission sitting as the State Board of Equalization and Review, December 14, 1983**

# BEFORE THE PROPERTY TAX COMMISSION SITTING AS STATE BOARD OF EQUALIZATION AND REVIEW

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE MATTER OF:

THE APPEAL OF R. J. REYNOLDS TOBACCO COMPANY FROM THE DENIALS OF ITS CLAIMS FOR EXEMPTION BY DURHAM COUNTY AND FORSYTH COUNTY FOR 1983

[December 14, 1983]

## FINAL DECISION

This matter coming on to be heard, and being heard, before the Property Tax Commission, sitting as the State Board of Equalization and Review in the City of Raleigh, Wake County, North Carolina, on October 27, 1983, pursuant to the appeal of the above taxpayer from the denials of its claims for exemption by the Durham County Board of Equalization and Review and the Forsyth County Board of Equalization and Review for 1983.

## STATEMENT OF CASE

Appellant R. J. Reynolds Tobacco Company (hereinafter Reynolds) timely applied for exemption from property taxation for leaf tobacco stored in Durham and Forsyth Counties as of January 1, 1983. Each county's tax supervisor denied the application, and each county's board of equalization and review upheld the denial. Appellant timely appealed the adverse decisions of the boards to the Property Tax Commission. The appeals were consolidated for hearing before the Commission.

Prior to the hearing Durham County filed a Motion to Dismiss the appeal from that county on the ground that Reynolds failed to perfect its appeal to the Commission. After hearing arguments on that motion at the outset of the hearing, the Commission took the motion to dismiss under advisement, and the parties proceeded to present evidence in the matter.

Reynolds contended to the Commission that imported tobacco owned by Reynolds and stored in United States customs bonded warehouses located in Durham and Forsyth Counties is excluded from ad valorem taxation by the decision of the Supreme Court of the United States in *Xerox Corporation* v. *County of Harris, Texas, and City of Houston, Texas,* —— U.S. ——, 103 S.Ct. 523, 74 L.Ed. 2d 323 (1982). Durham and Forsyth Counties contended that the imported tobacco is not excluded from ad valorem taxation by that decision.

A Motion to Admit Francis H. Skinner to limited practice before the Commission in this case was allowed. Reynolds was represented at the hearing by Mr. Skinner and Thomas L. Kummer.

Durham County was represented by S. C. Kitchen, assistant county attorney.

Forsyth County was represented by P. Eugene Price, Jr., county attorney, and Jonathan V. Maxwell, assistant county attorney.

Kernersville was represented by John G. Wolfe, III, town attorney.

ISSUE

Is the imported tobacco owned by Reynolds and stored in United States customs bonded warehouses located in Durham and Forsyth Counties excluded from ad valorem taxation by those counties in accordance with the decision of the Supreme Court of the United States in *Xerox Corporation* v. *County of Harris, Texas, and City of Houston, Texas,* —— U.S. ——, 103 S.Ct. 523, 74 L.Ed. 2d 323 (1982)?



EVIDENCE

The evidence presented by Reynolds and considered by the Commission consists of the following:

(1) Appellant's Exhibit No. 1—1983 Durham County, North Carolina, Business Property Statement with attached schedule; Letter dated March 31, 1983, from James T. Barg to Bruce Mangum; Application for Property Tax Exemption, dated March 30, 1983.

(2) Appellant's Exhibit No. 2—Letter dated April 15, 1983, from S. Bruce Mangum to James T. Barg.

(3) Appellant's Exhibit No. 3—Real or Personal Property Complaint, Durham County, dated April 29, 1983, with attachment.

(4) Appellant's Exhibit No. 4—Letter dated June 3, 1983, from S. Bruce Mangum to James T. Barg; Minutes, Durham County Board of Equalization and Review, May 23, 1983.

(5) Appellant's Exhibit No. 5A—1983 Forsyth County Business Personal Property Listing with attached schedule, Kernersville,

(6) Appellant's Exhibit No. 5B—1983 Forsyth County Business Personal Property Listing with attached schedule, Winston-Salem.

(7) Appellant's Exhibit No. 6—Letter dated June 2, 1983, from W. Harvey Pardue to James T. Barg.

(8) Appellant's Exhibit No. 7—Letter dated June 13, 1983, from James W. McGrath to W. Harvey Pardue.

(9) Appellant's Exhibit No. 8—Letter dated June 29, 1983, from W. Harvey Pardue to James W. McGrath.

(10) Appellant's Exhibit No. 9—Permit Warehouse Entry, U. S. Customs Service form 7502-A; Warehouse Permit, Continuation Sheet, Bureau of Customs form 7502-C.

(11) Appellant's Exhibit No. 10—Permit, Duty Paid, Warehouse Withdrawal for Consumption, United States Customs Service form 7505-A.

(12) Oral testimony of James T. Barg.

(13) Oral testimony of Harry L. Sapp.

The evidence presented by Durham County and considered by the Commission consists of the following:

(1) Oral testimony of S. Bruce Mangum.

The evidence presented by Forsyth County and considered by the Commission consists of the following:

(1) Forsyth County Exhibit No. 4—Letter dated June 3, 1983, from W. Harvey Pardue to James T. Barg.

(2) Forsyth County Exhibit No. 5—Letter dated June 21, 1983, from James T. Barg to W. Harvey Pardue.

(3) Oral testimony of W. Harvey Pardue.

Reynolds, Durham County and Forsyth County submitted briefs to the Commission.

In addition to the evidence presented by the parties, the Commission also considered the following exhibits:

*Appeal from Durham County*

C-1 Notice of Appeal and Application for Hearing, dated June 14, 1983.



C-2 Commission's acknowledgement of Notice of Appeal, dated June 16, 1983.

C-3 County's Motion to Dismiss, dated July 6, 1983.

C-4 Commission's acknowledgement of C-3, dated July 7, 1983.

C-5 Notice to parties of date and time of hearing, dated August 31, 1983.

C-6 Order on Final Pre-Hearing Conference, approved October 27, 1983.

C-7 Motion to Admit Francis H. Skinner to Limited Practice.

*Appeal from Forsyth County*

C-1 Notice of Appeal and Application for Hearing, dated July 7, 1983.

C-2 Commission's acknowledgement of Notice of Appeal, dated July 11, 1983.

C-3 Letter dated July 22, 1983, from P. Eugene Price, Jr., to Commission, transmitting County's Response to Notice of Appeal.

C-4 County's Response to Notice of Appeal, dated July 22, 1983.

C-5 Commission's acknowledgement of C-3 and C-4, dated July 25, 1983.

C-6 Notices to parties of date and time of hearing, dated August 31, 1983.

C-7 Letter, dated September 2, 1983, from P. Eugene Price, Jr., to Commission, transmitting County's Amended Response.

C-8 County's Amended Response, dated September 2, 1983.

C-9 Commission's acknowledgement of C-7 and C-8, dated September 8, 1983.

C-10 Letter, dated October 13, 1983, to Commission from Jonathan V. Maxwell.

C-11 Order on Final Pre-Hearing Conference, approved October 27, 1983.

C-12 Motion to Admit Francis H. Skinner to Limited Practice.

## FINDINGS OF FACT

Durham County and Reynolds stipulated to the following facts, which are hereby adopted by the Commission as its findings of fact:

(1) R. J. Reynolds Tobacco Company is a New Jersey corporation qualified to do business in the State of North Carolina, with its principal offices and manufacturing facilities in Winston-Salem, Forsyth County, North Carolina.

(2) Reynolds is engaged in Forsyth County, North Carolina, in the business of manufacturing finished tobacco products.

(3) Reynolds sells such products to wholesale distributors and other authorized purchasers in the United States and other countries.

(4) Durham County is a duly authorized taxing unit of the State of North Carolina. Durham County, through its tax supervisor, is duly authorized by law to administer tax assessment matters.

(5) Reynolds uses tobacco grown both in the United States and in foreign countries in manufacturing its finished tobacco products in Forsyth County.



(6) Reynolds made an application with the County of Durham for exemption or immunity of imported leaf tobacco stored in customs bonded warehouses in the County of Durham.

(7) The Board of Equalization and Review of Durham County denied the application of Reynolds and notified Reynolds of this denial on June 3, 1983.

(8) Reynolds filed a Notice of Hearing and Application for Hearing with the following parties which was received on June 15, 1983:

Mr. S. Bruce Mangum
Clerk of the Durham County Board of Commissioners
Room 206
County Judicial Building
Durham, North Carolina 27701

Lester W. Owen, Esquire
Durham County Attorney
Post Office Box 810
Durham, North Carolina 27702

Mr. S. Bruce Mangum
County Supervisor of Taxation
Room 206
County Judicial Building
Durham, North Carolina 27701

(9) Edmund Slade Swindell, Jr., is the Clerk of the Board of County Commissioners of Durham County during the time of the Application for Exemption and continuing to the present.

(10) Customs duties are paid on the imported tobacco stored in Durham County when the tobacco leaves the gate of the Durham facility, not when it arrives in Forsyth County.

Forsyth County and Reynolds stipulated to the following facts, which are hereby adopted by the Commission as its findings of fact:

(11) R. J. Reynolds Tobacco Company is a New Jersey corporation qualified to do business in the State of North Carolina, with its principal offices and manufacturing facilities in Winston-Salem, Forsyth County, North Carolina.

(12) Reynolds is engaged in Forsyth County, North Carolina, in the business of manufacturing finished tobacco products.

(13) Forsyth County, the City of Winston-Salem, and the Town of Kernersville are duly authorized taxing units of the State of North Carolina. Forsyth County, through its tax supervisor, is duly authorized by law to administer tax assessment matters on its own behalf and on behalf of the City of Winston-Salem and Town of Kernersville.

(14) Reynolds uses tobacco grown both in the United States and in foreign countries in manufacturing its finished tobacco products in Forsyth County.

Based on the evidence of record, the Commission makes the following additional findings of fact:

(15) Reynolds, in a schedule attached to its 1983 Durham County Business Property Statement, informed the county that in addition to leaf tobacco which it had listed as raw materials, it also had "exempt" leaf tobacco in storage in the city and county of Durham, as of December 31, 1982, at a cost of $86,610,659.

(16) Reynolds, in a schedule attached to its 1983 Forsyth County Business Personal Property



Listing, informed the county that in addition to leaf tobacco which it had listed as raw materials, it had "exempt and or immune" leaf tobacco in storage in Kernersville, Forsyth County, as of December 31, 1982, at a cost of $247,675,428, and in Winston-Salem, Forsyth County, as of December 31, 1982, at a cost of $184,773,440.

(17) All of this purportedly "exempt" tobacco in storage in Durham and Forsyth Counties had been imported by Reynolds from foreign countries, including Bulgaria, Syria, Lebanon and Brazil.

(18) After the tobacco had been shipped by bonded carrier to the United States, it was unloaded from the carrier at a port of entry. It was then transported by rail or truck to a storage facility.

(19) The imported tobacco is placed under customs bond when it is unloaded at the port of entry, and it remains under customs bond at all times thereafter, until it is withdrawn from storage.

(20) Appropriate United States customs documents are prepared for each shipment of imported tobacco.

(21) The completed customs forms are maintained by Reynolds; copies of the forms are submitted to the United States customs office when each shipment of the stored tobacco has been consumed.

(22) Until December, 1982, the United States customs office kept the bonded warehouse records.

(23) The storage facilities in which Reynolds holds the imported tobacco are United States customs bonded warehouses, categorized as either Class 2 or Class 8 warehouses.

(24) Reynolds has 26 customs bonded warehouses in Durham County and 62 customs bonded warehouses in Forsyth County.

(25) The Class 8 bonded areas are storage sheds located in both Durham and Forsyth Counties.

(26) The Class 2 bonded areas are located within the manufacturing plants owned by Reynolds in the area of Winston-Salem, Forsyth County, known as Whitaker Park.

(27) The normal progress of the imported tobacco is from a Class 8 area to a Class 2 area to the manufacturing process.

(28) The United States customs bonded warehouses and the land on which they are situated, in both Durham and Forsyth Counties, are owned by Reynolds.

(29) All the property within the bonded warehouses is owned by Reynolds, and Reynolds is the sole user of the warehouses.

(30) Reynolds pays all expenses of maintaining and supervising the warehouses and the imported tobacco which is stored therein.

(31) Employees of Reynolds or private security guards hired by Reynolds guard the storage facilities.

(32) There are no federal customs officials on the bonded premises on a regular basis, although federal customs officials appear "periodically" to review the books and records maintained by Reynolds.

(33) The United States customs office exerts control over the bonded warehouses through auditors and unannounced spot checks.



(34) Customs officials have access to the warehouse facilities 24 hours a day.

(35) As of October 27, 1983, at least three times since January 1, 1983, a customs official has appeared on the premises of the bonded warehouses.

(36) The imported tobacco may be moved or turned over by Reynolds while it is in bonded storage. The tobacco can also be repacked if it has incurred damage.

(37) Some of the imported tobacco is already aged when it arrives in the United States. Ordinarily, the remaining tobacco requires an aging process before it can be used in manufacturing.

(38) Tobacco imported by Reynolds is normally held in storage for two years before it is used in the manufacturing process.

(39) Virtually all the stored imported tobacco in Durham County is or will be used for the domestic manufacture by Reynolds of finished tobacco products in Forsyth County.

(40) Reynolds's purpose for bringing imported tobacco into Forsyth County is to blend it with domestically-grown tobacco in the manufacturing operations in Winston-Salem.

(41) Any tobacco withdrawn from storage is normally manufactured into finished products within two weeks.

(42) The manufactured tobacco products are transported to Reynolds's wholesale and retail dealers and distributors within 30 days.

(43) Virtually all the tobacco products manufactured by Reynolds from imported tobacco are sold and consumed in the United States.

(44) None of the imported tobacco in bonded storage was being held for export by Reynolds.

(45) The imported tobacco can be removed from bonded storage whenever Reynolds has a need for it or desires to remove it, upon payment of the appropriate customs duties.

(46) Customs duties are paid by Reynolds to the federal government when the imported tobacco is withdrawn from bonded storage for manufacturing.

(47) A customs form 7505-A is required for each withdrawal.

(48) As of January 1, 1983, customs duties paid or to be paid by Reynolds on the imported tobacco totalled 35-40 million dollars in Forsyth County and 7-8 million dollars in Durham County.

(49) The reason Reynolds stores the tobacco in customs bonded warehouse is to defer payments of federal import duties.

(50) All tobacco owned and stored by Reynolds in non-bonded warehouses is taxed by Durham and Forsyth Counties.

(51) The customs bonded warehouses and the land underlying them are subject to property taxation by both counties at their full tax rates.

(52) The imported tobacco in storage receives fire and police protection and other services provided by the city and county of Durham and by Winston-Salem, Kernersville and Forsyth County.

(53) The property taxes levied on the imported tobacco are nondiscriminatory. The applicable city and county tax rates are the same for the imported tobacco as for all other stored tobacco.



## CONCLUSIONS, DECISION AND ORDER

The Commission first addresses Durham County's motion to dismiss the appeal.

Reynolds filed a written notice of appeal and a written statement of the grounds of appeal with the Property Tax Commission within the 30-day period prescribed by N.C.G.S. 105.324(c). In its certificate of service attached to the notice of appeal, Reynolds certified that it mailed copies of the notice to the following parties:

Mr. S. Bruce Mangum
Clerk to the Durham County Board of Commissioners
Room 206
County Judicial Building
Durham, North Carolina 27701

Lester W. Owen, Esquire
Durham County Attorney
P.O. Box 810
Durham, North Carolina 27702

Mr. S. Bruce Mangum
County Supervisor of Taxation
Room 206
County Judicial Building
Durham, North Carolina 27701

Durham County's motion to dismiss the appeal is based on the fact that Edmund Slade Swindell, Jr., and not S. Bruce Mangum, was clerk of the board of county commissioners of Durham County during the relevant time period.

The Commission denies Durham County's motion to dismiss the appeal. Reynolds certified that it had mailed a copy of its notice of appeal to the "Clerk to the Durham County Board of Commissioners," although Reynolds incorrectly named Mr. S. Bruce Mangum as the clerk. The Commission notes that under N.C.G.S. 105-322(d), it is

the tax supervisor who is named to serve as clerk to the board of equalization and review, and it is the decision of the Durham County Board of Equalization and Review from which Reynolds appealed in this case. Furthermore, Reynolds mailed copies of its notice of appeal to the Durham County attorney and to the county tax supervisor, and Durham County concedes that it was not prejudiced by the failure of Reynolds to mail a copy to Edmund Slade Swindell, Jr.

Durham County cites *Walter Corporation* v. *Gilliam*, 260 N.C. 211, 132 S.E. 2d 313 (1963), as authority for the Commission's dismissal of this appeal. In that case, there was "an utter disregard for the statutes, rules and procedures governing appeals." 260 N.C. at 212. Among irregularities cited by the Court, there was never an appeal entered on the judgment docket within 10 days from the entry of the judgment, and "no notice as contemplated by the statute was ever given to the adverse party." 260 N.C. at 213. The Commission cannot agree with Durham County that such a situation exists in the case before it.

The Commission now turns to the substantive issue presented in this appeal.

In *Xerox Corporation* v. *County of Harris, Texas, and City of Houston, Texas*, Chief Justice Burger formulated the question for review by the Supreme Court as follows: "[T]o decide whether a state may impose nondiscriminatory ad valorem personal property taxes on imported goods stored under bond in a customs warehouse and destined for foreign markets." 103 S. Ct. at 524, 74 L. Ed. 2d at 326. In that case the imported goods were copying machines which had been assembled by Xerox's affiliate in Mexico and then transported to Houston, Texas, where the copiers were stored in a customs bonded warehouse. For the duration of the storage period the copiers were "awaiting sale and shipment to Xerox affiliates in Latin America." 103 S. Ct. at 524, 74 L. Ed. 2d at 326. The copiers were designed for sale in Latin America, and, as the Court pointed out, "None of the copiers assembled in Mexico and stored in Houston were ever sold to customers for domestic use; all were ultimately sold abroad. Consequently, Xerox paid no import duties on them." 103 S. Ct. at 525, 74 L. Ed. 2d at 327. Under these factual circumstances, the Supreme Court answered the question for its review in the negative.



The Property Tax Commission is of the opinion that the question answered by the Supreme Court in *Xerox* is significantly different from the essential question presented for the Commission's review. Based on the Commission's findings of fact numbered 39, 44 and 48, the Commission concludes that the imported tobacco at issue in this case, although stored under bond in customs warehouses in Durham and Forsyth Counties, was clearly not "destined for foreign markets" as were the imported copiers in *Xerox*. One of the criteria enunciated in *Xerox*, therefore, is not met in the case before the Commission.

In its discussion in *Xerox* of the role of government regulated, bonded warehouses in the history of foreign commerce, the Court summarized as follows:

> In short, Congress created secure and duty free enclaves under federal control in order to encourage merchants here and abroad to make use of American ports. The question is whether it would be compatible with the comprehensive scheme Congress enacted to effect these goals if the states were free to tax such goods while they were *lodged temporarily in government regulated bonded storage in this country.* 103 S. Ct. at 526-27, 74 L. Ed. 2d at 329. [Emphasis supplied.]

The Commission concludes that the imported tobacco in this case is not "lodged temporarily in government regulated bonded storage in this country." Because none of

the imported tobacco is being held for export by Reynolds, there is nothing temporary about its existence in this country.

The *Xerox* opinion cites two cases involving attempts by the state to tax imported goods stored in customs bonded warehouses. In *McGoldrick* v. *Gulf Oil Co.*, 309 U.S. 414, 60 S. Ct. 664, 84 L. Ed. 840, (1939) it was held that the City of New York could not impose a sales tax on imported petroleum which, after being refined, was sold as ships' stores to vessels bound abroad. The petroleum was free from all duties and the refined products were not sold in domestic commerce. In *District of Columbia* v. *International Distributing Corp.*, 331 F. 2d 817 (CADC 1964), it was held that the District of Columbia could not impose an excise tax on the sale of imported alcoholic beverages to foreign embassies while the beverages were stored in a customs bonded warehouse.

The facts in the case before the Commission are clearly distinguishable from the facts in the *Xerox* case and the cases cited therein. The facts in the case before the Commission are more nearly like the facts in *American Smelting and Refining Co.* v. *County of Contra Costa*, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570 (1969), appeal dismissed, 396 U.S. 273, 90 S. Ct. 553, rehearing denied, 397 U.S. 958, 90 S. Ct. 940 (1970), in which it was held that a state can impose a nondiscriminatory tax on imported goods stored in bonded warehouses when the goods have been imported for domestic consumption, and not destined for foreign consumption. Finding of fact 53 supports the Commission's conclusion that the property tax imposed by Durham and Forsyth Counties on the imported tobacco is not discriminatory.

Finally, the Commission notes that while the holding in *Xerox*, read without reference to the remaining portions of the opinion, and in particular the question for review by the Court, might on its face appear to apply



to any goods stored under bond in a customs warehouse, it seems clear to the Commission that the holding does not preclude nondiscriminatory ad valorem personal property taxes on imported goods stored under bond in a customs warehouse but which, and this is the crucial fact, are not destined for foreign markets.

The Commission holds, therefore, that the Durham County Board of Equalization and Review and the Forsyth County Board of Equalization and Review were correct in denying Reynolds' claims for exemption from property taxation for imported tobacco stored in customs bonded warehouses in Durham and Forsyth Counties as of January 1, 1983.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the taxation of Reynolds' imported tobacco by Durham and Forsyth Counties be, and it is hereby, affirmed.

Commission Member James E. Long did not participate in this decision.

Entered this 14th day of December, 1983.

[SEAL]

NORTH CAROLINA PROPERTY
TAX COMMISSION

/s/ Clarence E. Leatherman
CLARENCE E. LEATHERMAN
Vice Chairman

Attest:

/s/ D. R. Holbrook
D. R. HOLBROOK
Secretary

## APPENDIX E

**Notice of Appeal to the Supreme Court of the United States from the Judgment of the Supreme Court of North Carolina, November 14, 1985**

IN THE SUPREME COURT OF NORTH CAROLINA

No. 222P85

IN THE MATTER OF:

THE APPEAL OF R. J. REYNOLDS TOBACCO COMPANY FROM THE DENIALS OF ITS CLAIMS FOR EXEMPTION BY DURHAM COUNTY AND FORSYTH COUNTY FOR 1983.

[Filed Nov. 14, 1985]

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

R. J. Reynolds Tobacco Company hereby gives notice of appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of North Carolina, dismissing an appeal and denying a petition for discretionary review, entered on October 2, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Thomas L. Kummer
THOMAS L. KUMMER

/s/ John A. Cocklereece, Jr.
JOHN A. COCKLEREECE, JR.
Horton, Hendrick & Kummer
450 NCNB Plaza
Winston-Salem, NC 27101
(912) 723-1826

Counsel for Appellant
R. J. Reynolds Tobacco Company

## APPENDIX F

**Notice of Appeal to the Supreme Court of the United States from the Judgment of the North Carolina Court of Appeals, November 14, 1985**

IN THE NORTH CAROLINA COURT OF APPEALS

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No. 8410PTC481

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IN THE MATTER OF:

THE APPEAL OF R. J. REYNOLDS TOBACCO COMPANY FROM THE DENIALS OF ITS CLAIMS FOR EXEMPTION BY DURHAM COUNTY AND FORSYTH COUNTY FOR 1983.

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[Filed Nov. 14, 1985]

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## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

R. J. Reynolds Tobacco Company hereby gives notice of appeal to the Supreme Court of the United States from the final judgment of the North Carolina Court of Appeals, finding that the levy of an ad valorem property tax on property stored in a customs bonded warehouse is not proscribed by the United States Constitution, entered on April 8, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Thomas L. Kummer
THOMAS L. KUMMER

/s/ John A. Cocklereece, Jr.
JOHN A. COCKLEREECE, JR.
Horton, Hendrick & Kummer
450 NCNB Plaza
Winston-Salem, NC 27101
(919) 723-1826

Counsel for Appellant
R. J. Reynolds Tobacco Company

# APPENDIX G

**Portions of the Transcript of the Oral Argument in *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982)**

IN THE SUPREME COURT
OF THE UNITED STATES

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No. 81-1489

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XEROX CORPORATION,
*Appellant*

v.

COUNTY OF HARRIS, TEXAS and
CITY OF HOUSTON, TEXAS

---

Washington, D.C.
Wednesday, November 10, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 o'clock a.m.

APPEARANCES:

ALFRED H. HODDINOTT, JR., ESQ., Stamford, Connecticut; on behalf of the Appellant.

CHERYL HELENA CHAPMAN, ESQ., Senior Assistant, City Attorney, Houston, Texas; on behalf of the Appellee

ORAL ARGUMENT OF
ALFRED H. HODDINOTT, JR., ESQ.
ON BEHALF OF THE APPELLANT

* * * *

[10] QUESTION: But you say that this is different even though Xerox's stuff, if it had been destined for

domestic use, you have paid taxes on it and it would be taxable.

MR. HODDINOTT: I am sorry, I didn't follow the question, Your Honor.

QUESTION: If the same amount of Xerox computers had been stored in exactly the same warehouse but destined for domestic use, you, of course, have paid taxes on them.

MR. HODDINOTT: When you say destined, Your Honor, if they had already passed the Customs barrier, and the duties had been paid, then I would agree, but until the Customs duties are paid, I submit they are not taxable.

QUESTION: But it makes no difference to your case even if they were in the Houston warehouse for 20 [11] years, I take it.

MR. HODDINOTT: No. But it—the Customs statutes permit storage for three years, and it makes a difference as long as they were there for the three years permitted by Congress.

* * * *

[21] MR. HODDINOTT: We believe that Xerox's copiers were in transit. The courts have consistently held that when they are in a Customs bonded warehouse, it is as if they were detained at the border. The cases [22] cited by appellees and by the court below all related to interstate commerce, where the goods fell into some state when the journey ended or where it was—or it was there before the journey stated.

Those cases would be applicable to Xerox only if the goods cleared Customs and entered interstate commerce. The state can stand at the warehouse door, and the moment the goods pass through, it can assert its tax, but those cases involving interstate commerce are not applicable until then, and our goods were still passing in foreign commerce.

* * * *



## ORAL ARGUMENT OF CHERYL HELENA CHAPMAN, ESQ. ON BEHALF OF THE APPELLEE

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[34] QUESTION: Well, suppose you had automobiles manufactured in the same setting as this, destined for England or Sweden or some other country where they have the righthand drive. They could be sold in the United [35] States, too, because a great many people, or at least some people use a righthand drive car in this country, but because it was adaptable, if they had been in bonded warehouses, would that adaptability have any impact on the legal issues in this case?

MS. CHAPMAN: Yes. The adaptability has no impact on the legal issues. Our position is that as long as those goods are stored in Houston for the business convenience of Xerox, and there is no question about that, and the State of Texas has acquired a taxable situs, then we are entitled to tax those copiers.

QUESTION: But that would be independent of whether they could be modified for domestic use or not, in your view.

MS. CHAPMAN: Yes, and this Court has addressed that issue in the case of Kosydar versus—National Cash Register versus Kosydar, where the goods were only designed for foreign use.

QUESTION: Well, a bonded warehouse isn't available, is it, for an importer who simply wants to store his goods in a bonded warehouse pending domestic distribution?

MS. CHAPMAN: Yes, it is.

QUESTION: So you can bring your goods in and [36] delay the payment of duty until you get a market for it in the United States?

MS. CHAPMAN: And that was the original purpose of the Customs bonded warehousing scheme.

QUESTION: Does that have any other consequence than deferring the payment of the duty?

MS. CHAPMAN: No.

QUESTION: When it enters the country, instead of paying the duty immediately on entry if it goes into a bonded warehouse, the duty is deferred until it is taken out of the bonded warehouse for sale in the United States. Is that not so?

MS. CHAPMAN: That's correct.

QUESTION: So a company can just get cheaper warehousing by using a bonded warehouse. It just depends on what the cost of the bond is as compared to the domestic taxes.

MS. CHAPMAN: That's correct, and that is the likely result if Xerox obtains immunity under the Customs bond theory.

QUESTION: So it really doesn't make any difference in this case as to whether they were destined for a foreign market.

MS. CHAPMAN: Absolutely not.

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ORAL ARGUMENT OF
ALFRED H. HODDINOTT, J., ESQ.,
ON BEHALF OF THE APPELLANT—REBUTTAL

[47] MR. HODDINOTT: I would be happy to try and answer Justice Blackmun's question. The copiers could be worked over at a cost of over $100. It is not impossible for them to be used domestically, but it would be somewhat like Justice Berger's (sic) automobile. Presumably there is some way to switch the steering wheel from the right hand to the left hand.

QUESTION: Or you can use it just the way it is.

MR. HODDINOTT: You couldn't use the Xerox copier just the way it was—

[48] QUESTION: No, but the automobile.

MR. HODDINOTT:—because of the electricity.



QUESTION: Isn't it true that—Is it true that the bonded warehouse can be used by an importer who wants to distribute domestically? Can he use the bonding warehouse just to postpone the payment of his duties until he gets a domestic market?

MR. HODDINOTT: Goods that come from abroad coming into the United States may be held for up to three years and then brought in. Indeed, that is—

QUESTION: No matter where they are destined.

MR. HODDINOTT: No matter where they are destined. That is indeed the legislative purpose that is set forth in the Warehousing Act, Your Honor.

QUESTION: Now, would you say that Texas could levy its tax on the importer who is—who intends to take these goods into the United States?

MR. HODDINOTT: The minute it passes through the warehouse door, Your Honor. Once they are into—pass through the warehouse door—

QUESTION: You mean to be stored?

MR. HODDINOTT: No. While they are stored—

QUESTION: Well, is an importer who says, yes, these are going to be sold in the United States, and he [49] puts them in a bonded warehouse, and holds them for two years, may Texas levy a tax while they are in the warehouse?

MR. HODDINOTT: No, sir, that is directly opposed to the legislative purpose of the Warehousing Act.

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## APPENDIX H

**Statement of Congressman Wright,
Certain Trade and Tariff Bills, Hearings before
the Subcomm. on Trade of the House Comm. on Ways
and Means, 98th Cong., 1st Sess., pp. 330-31,
May 10, 1983**

## STATEMENT OF HON. JIM WRIGHT, A REPRESENATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. WRIGHT. This is Ernie Dean, the executive director of the Dallas-Fort Worth Airport Board, and Bill Methenitis is an attorney for the Dallas-Fort Worth Foreign Trade Zone. He practices law with the firm of Strasburger & Price, one of our leading law firms.

This is a very simple proposition which we propose in H.R. 717, which, incidentally, is cosponsored by our colleague, Jack Brooks. The bill, quite simply stated, would exempt from local ad valorem taxation any goods in foreign commerce that are in a foreign trade zone. That is what it does, and that is all it does. It is what you might call a general bill with a local application.

That is what we have here, Mr. Chairman. So far as I know, in all the United States, there are about 74 active foreign trade zones employing a total of some 29,000 people, and dealing in literally billions of dollars worth of goods in foreign trade every year.

They assist mightily in our attempting to cope with the foreign trade deficits that have beset us. They create employment for people in the United States, not just in the zones, but in the companies affected by the zones. I think all of us agree that it is a good thing to have foreign trade zones permitting the freest flow of trade in and out of the United States through them.

Now, there is only one case that I am aware of anywhere in the whole United States where a local taxing authority, a local city has presumed a right to levy local ad valorem taxes on goods in foreign commerce, the inventories in the foreign trade zone, and that, as luck would have it, occurred in my district, at the Dallas-Fort Worth Foreign Trade Zone, where the city of Irving, composed of some very fine Texas citizens, simply mis-

understood the nature of a foreign trade zone and undertook to levy local ad valorem taxes on all the inventories that are there in the foreign trade zones.

Well, it occurs that a recent Supreme Court decision in the case of Xerox versus the County of Harris already has ruled that you cannot do that with respect to a bonded warehouse, and I should think that the very same identical provision would apply here. Some States, including Kentucky, I happen to know, have acted legislatively within their State legislatures to exempt goods in foreign trade zones.

We do not think that is necessary that that be done, but they have undertaken nonetheless to do so, and make it abundantly clear that none of their local communities or counties are expected to levy taxes against goods in transit in a foreign trade zone.

Now, the problem in Texas is compounded by the fact that we could not just simply get a State legislative enactment in our State legislature expressly exempting these goods because of a peculiarity in the Texas constitution. Were we to try to handle it at the local level, we would have to amend the State constitution.

That, as you may be aware, is a matter of some difficulty, though it has been done several hundred times in the State of Texas. The legislature has to submit an amendment on a referendum, and all the voters have to vote for it, and it is always very confusing, because they wait until they have about 7 or 8 or 10 such amendments and then run them en bloc by the voters, and the legislature is just about to adjourn for the biennium.

Meanwhile, all of these goods out here that are in inventory in the companies that are engaging in foreign trade through our foreign trade zone are in jeopardy. It is very difficult to consummate transactions when the airport board and the foreign trade zone itself has to tell additional companies attempting to come in, when



they lie in jeopardy of their goods that they might import, intending to work on them there or put them together with other goods for sale locally or goods they intend to export, that they might be subject to local taxation by the city of Irving.

Therefore, in the interest of foreign trade and in the interest of all of the 74 foreign trade zones throughout the country, but primarily in the interest of the Dallas-Fort Worth zone, where the problem peculiarly exists, I would like to suggest and request that you pass this bill and incorporate it in your legislation.

I am told that on the Senate side it is contemplated that the two Texas Senators probably will join me in cosponsoring such legislation.

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## APPENDIX I

**Statement of Senator Tower,**
**129 Cong. Rec. S7748-49**
**(daily ed. June 6, 1983)**

## STATEMENT OF SENATOR TOWER

• Mr. TOWER. Mr. President, I am pleased to join my distinguished colleague from Texas, Senator BENTSEN, in introducing the Bentsen-Tower bill. The Bentsen-Tower bill is very simply a clarification of existing law that will remedy a gap in the national uniformity of treatment of international trade.

Congress created foreign trade zones to make our country competitive in the international marketplace. Local taxation of goods located in a foreign trade zone would, of course, frustrate the congressional purpose. The Federal preemption of this type of taxation has been uniformly recognized outside of Texas. However, because of restrictions in the Texas constitution, the formal recognition by the State of Texas is not possible.

The lack of a definitive statute in Texas has created a hesitation among businesses that might otherwise use Texas foreign trade zones. A State statute is, of course, not necessary to restate a Federal preemption. A State statute would be merely gratuitous, to insure that local authorities comply with Federal law. Without such a statute to show local assessors, however, businesses are concerned that they will be forced to go to court in order to secure an ad valorem tax exemption to which they are entitled. Although the recent U.S. Supreme Court case of Xerox Corporation against Harris County seems to make the state of the law clear, businesses do not like to operate based on how case law would help them if they are forced to go to court.

By simply restating the existing Federal preemption of ad valorem taxation, the Bentsen-Tower bill will be able to facilitate the development of foreign trade zones. In the past 15 years, the number of jobs in foreign trade zones have increased by 20 times, and the value of shipments through foreign trade zones has increased to over

$7 billion. This bill will further enhance the growth of foreign trade zones, and by adding American value to goods manufactured or assembled in foreign countries, the deficit in the balance of trade is reduced.

I firmly believe that the enactment of the Bentsen-Tower bill, by merely clarifying the existing Federal preemption of ad valorem taxation of Federal trade zone inventory, will enhance the development of all foreign trade zones and fulfill the congressional intent in establishing foreign trade zones, the creation of new jobs, and encouragement of capital investment.●

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# APPENDIX J

**House Report No. 267,**
**98th Cong., 1st Sess., pp. 35-36,**
**June 24, 1983**

## HOUSE REPORT NO. 267

### PARAGRAPH (b)—EXEMPTION FROM STATE AND LOCAL AD VALOREM TAXES

(Originally introduced as H.R. 717 by Mr. Wright)

Section 211, paragraph (b), would amend section 15 of the Foreign Trade Zones Act of 1934, to exempt from State and local ad valorem taxation tangible personal property imported from outside the United States and tangible personal property produced in the United States and held in a zone for exportation.

The goal of this legislation is to affirm the original purpose of FTZs (to expedite and encourage foreign commerce) and to confirm that Congress intended not to permit the imposition of such taxes. The new subsection is designed to insure that FTZs would be uniformly treated by non-Federal taxing authorities. In addition, the amendment would eliminate such tax concerns from among the factors to be considered by potential FTZ operators or users when deciding where an operation of FTZ is to be located.

Further, the bill was introduced due to a unique problem in the State of Texas in which local taxing jurisdiction does not have the authority to exempt tangible personal property in a FTZ from taxation due to the State constitution. The State of Texas' constitution specifically provides for certain articles to be exempt from taxation. No other items can be exempted without a change in the Constitution. It is expected that Federal law would preempt State law in this case.

It is the intention of this legislation that the following considerations would be applied when implementing this legislation:

*(1) Bona fide customs use of Foreign Trade Zone.*—Based upon the practice followed in states already granting this exemption, by interpretation, the benefits would

apply only to goods in the zone for bona fide customs reasons.

*(2) Machinery and Equipment.*—Since the Foreign Trade Zone Act of 1934 does not apply to machinery and equipment within a zone for use therein the benefits of the bill would not extend to such items.

The FTZs were intended by Congress to be special instrumentalities which would stimulate and facilitate foreign commerce and which would not be considered as part of the United States for customs purposes. The zones are unique and limited federally-created entities; while the States provide services to the zones, State taxing authority should be viewed in the context of Federal statutes and regulations and of the Constitution, as well as the overall framework of State-Federal relations.

It would appear that the principal type of tax which would be proscribed by the legislation is a personal property tax, one levied on goods held by the potential taxpayer on a given date, especially articles used in commerce or inventoried for future sale. Absent this legislation, such a tax could be arguably assessed on merchandise or materials located or being stored in a FTZ, even if the materials or articles were intended for export to countries other than the United States. This form of tax is generally aimed at raising revenue for the taxing authority, rather than at controlling the use of the property; however, the cost of paying a property tax might be passed along to consumers, raising the price of the merchandise. Thus, the tax might have the effect of a duty when imposed on FTZ property, which might be imported into this country, and impinge upon the Congress' exercise of its Article I authority. While not every State tax will be found on review to be a prohibited impost or duty, and while a State may not be discriminating in assessing the tax on all articles in its geographical territory regardless of origin, such a tax may constitute a burden on foreign and interstate commerce, in light of the subject of the tax.

# APPENDIX K

**Senate Report No. 308,**
**98th Cong., 1st Sess., pp. 35-37,**
**November 10, 1983**

## SENATE REPORT NO. 308

### SECTION 214—PRECLUSION OF STATE AND LOCAL TAXATION OF PERSONAL PROPERTY IN FOREIGN TRADE ZONES

*Current law.*—In general, merchandise may be brought into a foreign trade zone without being subject to the customs laws of the United States (the Foreign Trade Zones Act of 1934, 19 U.S. Code sec. 81a et seq.). Merchandise may generally be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise or otherwise manipulated in a foreign trade zone, or be manufactured in a foreign trade zone, without being subject to U.S. customs laws, and it may then be exported or destroyed without being subject to U.S. customs laws. This exemption does not apply to machinery and equipment that is imported for use (for manufacturing or the like) within a foreign trade zone.

When foreign merchandise moves from a foreign trade zone into customs territory of the United States it is subject to the laws and regulations of the United States affecting imported merchandise. At the point, U.S. import duties apply.

A similar deferral of U.S. import duties applies to goods stored in government supervised bonded customs warehouses, which are generally treated as being outside U.S. customs territory. Only if goods are withdrawn for domestic sale or stored beyond a prescribed period does any duty become due. The Supreme Court of the United States has ruled that Congress's comprehensive regulation of customs duties preempts state property taxes on goods stored under bond in a customs warehouse (*Xerox Corp.* v. *County of Harris, Texas, and City of Houston, Texas*, No. 81-1489, December 13, 1982).

*The bill.*—Section 214 would amend section 15 of the Foreign Trade Zones Act of 1934 to make it clear that

tangible personal property imported from outside the United States and held in a foreign trade zone for the purpose of storage, sale, exhibition, repackaging, assembly, distribution, sorting, grading, cleaning, mixing, display, manufacturing, or processing, and tangible personal property produced in the United States and held in a zone for exportation, either in its original form or as altered by any of the above processes, would be exempt from State and local ad valorem taxation . . . The bill would preempt State law of local law imposing ad valorem taxation on such property.

As for imported goods, the benefits of the bill would apply only to goods in a foreign trade zone for bona fide customs reasons. That is, it would not apply to property imported into the United States for use in manufacturing within a foreign trade zone (rather than for sale). Moreover, the Foreign Trade Zone Act of 1934 does not apply to machinery and equipment within a zone for use therein, so the benefits of the bill would not extend to those items whatever their origin.

As for U.S.-produced property, the benefits of the bill would apply only if the property were held in the zone for exportation. The benefits would not apply to U.S.-produced property that was present in the zone for combination with imported property or for other processing if the U.S.-produced property were destined for later use in or sale into the United States. By contract, the benefits would apply to U.S.-produced property that was present in the zone for combination with imported property or for other processing if the U.S.-produced property were destined for later use or sale outside the United States.

*Reason for provision.*—Local taxing jurisdictions in Texas may seek to declare exemptions for property taxes on some tangible personal property stored in foreign trade zones, but are precluded from doing so by the Texas Constitution. The local foreign trade zones thus are dis-



advantaged in promoting the benefits of zones in their localities. The committee is unaware of any states or localities outside the State of Texas that seek to impose property taxes on tangible personal property located in foreign trade zones for bona fide customs reasons, or have a bar similar to that in Texas that would preclude localities from declaring an exemption to such a tax.

## APPENDIX L

### Statutes and Regulations Involved

TITLE 19, UNITED STATES CODE (1982)

**§ 1555. Bonded warehouses**

Buildings or parts of buildings and other enclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the appropriate customs officer, or under seizure, or for the manufacture of merchandise in bond, or for the repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse. Except as otherwise provided in this chapter, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the owner or proprietor of the warehouse, under supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be

reimbursed to the Government by the proprietor of such warehouse.

(June 17, 1930, ch. 497, title IV, § 555, 46 Stat. 743; June 2, 1970, Pub. L. 91-271, title III, § 301(b), 84 Stat. 287.)

### § 1556. Bonded warehouses; regulations for establishing

The Secretary of the Treasury shall from time to time establish such rules and regulations as may be necessary for the establishment of bonded warehouses and to protect the interests of the Government in the conduct, management, and operation of such warehouses and in the withdrawal of and accounting for merchandise deposited therein.

(June 17, 1930, ch. 497, title IV, § 566, 46 Stat. 743.)

### § 1557. Entry for warehouse

#### (a) Withdrawal of merchandise; time; payment of charges

Any merchandise subject to duty, with the exception of perishable articles and explosive substances other than firecrackers, may be entered for warehousing and be deposited in a bonded warehouse at the expense and risk of the owner [1] purchaser, importer, or consignee. Such merchandise may be withdrawn, at any time within 5 years from the date of importation, for consumption upon payment of the duties and charges accruing thereon at the rate of duty imposed by law upon such merchandise at the date of withdrawal; or may be withdrawn for exportation or for transportation and exportation to a foreign country, or for shipment or for transportation and shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or the island of Guam, without the payment of duties

[1] So in original. Probably should be followed by a comma.



thereon, or for transportation and rewarehousing at another port or elsewhere, or for transfer to another bonded warehouse at the same port: *Provided*, That the total period of time for which such merchandise may remain in bonded warehouse shall not exceed 5 years from the date of importation. Merchandise upon which the duties have been paid and which shall have remained continuously in bonded warehouse or otherwise in the custody and under the control of customs officers, may be entered or withdrawn at any time within 5 years after the date of importation for exportation or for transportation and exportation to a foreign country, or for shipment or for transportation and shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or the island of Guam, under such regulations as the Secretary of the Treasury shall prescribe, and upon such entry or withdrawal, and exportation or shipment, the duties thereon shall be refunded.

#### (b) Transferral of right of withdrawal

The right to withdraw any merchandise entered in accordance with subsection (a) of this section for the purposes specified in such subsection may be transferred upon compliance with regulations prescribed by the Secretary of the Treasury and upon the filing by the transferee of a bond in such amount and containing such conditions as the Secretary of the Treasury shall prescribe. The bond shall include an obligation to pay, with respect to the merchandise the subject of the transfer, all unpaid regular, increased, and additional duties, all unpaid taxes imposed upon or by reason of importation, and all unpaid charges and exactions. Such transfers shall be irrevocable, shall relieve the transferor from all customs liability with respect to obligations assumed by the transferee under the bond herein provided for, and shall confer upon the transferee all rights to the privileges provided for in this section and in sections 1562 and 1563

of this title which were vested in the transferor prior to the transfer. The transferee shall also have the right to receive all lawful refunds of money paid by him to the United States with respect to the merchandise the subject of the transfer, and shall have the right to file a protest under section 1514 of this title to the same extent that such right would have been available to the transferor. Notice of liquidation shall be given to the transferee in the form and manner prescribed by the Secretary of the Treasury. A transferee may further transfer the right to withdraw merchandise, subject to the provisions of this subsection relating to original transfers.

**(c) Destruction of merchandise at request of consignee**

Merchandise entered under bond, under any provision of law, may, upon payment of all charges other than duty on the merchandise, be destroyed, at the request and at the expense of the consignee, within the bonded period under customs supervision, in lieu of exportation, and upon such destruction the entry of such merchandise shall be liquidated without payment of duty and any duties collected shall be refunded.

**(d) Withdrawal before payment**

Merchandise may be withdrawn for consumption without the payment of the duty thereon if the importer of record or transferee is permitted to pay duty at a later time pursuant to regulations prescribed by the Secretary under section 1505 of this title.

(June 17, 1930, ch. 497, title IV, § 557, 46 Stat. 744; June 25, 1938, ch. 679, §§ 2, 22(a), 23(a), 52 Stat. 1077, 1087, 1088; Aug. 8, 1953, ch. 397, § 21(a), 67 Stat. 519; June 30, 1955, ch. 258, § 2(a)(4), 69 Stat. 242; June 2, 1970, Pub. L. 91-271, title III, § 301(t), 84 Stat. 290; Jan. 12, 1971, Pub. L. 91-685, § 1, 84 Stat. 2069; Oct. 3, 1978, Pub. L. 95-410, title I, § 108(a), (b)(1), 92 Stat. 892; Jan. 12, 1983, Pub. L. 97-446, title II, § 201(f), 96 Stat. 2350.)



**§ 1558. No remission or refund after release of merchandise**

**(a) Exceptions**

No remission, abatement, refund, or drawback of estimated or liquidated duty shall be allowed because of the exportation or destruction of any merchandise after its release from the custody of the Government, except in the following cases:

(1) When articles are exported with respect to which a drawback of duties is expressly provided for by law;

(2) When prohibited articles have been regularly entered in good faith and are subsequently exported or destroyed pursuant to a law of the United States and under such regulations as the Secretary of the Treasury may prescribe; and

(3) When articles entered under bond, under any provision of law, are destroyed within the bonded period as provided for in section 1557 of this title, or are destroyed within the bonded period by death, accidental fire, or other casualty, and proof of such destruction is furnished which shall be satisfactory to the Secretary of the Treasury, in which case any accrued duties shall be remitted or refunded and any condition in the bond that the articles shall be exported shall be deemed to have been satisfied.

**(b) Payment of duties required notwithstanding export or destruction of articles; exception**

When articles are exported or destroyed under customs supervision after once having been released from customs custody, as provided for in subsection (c) of section 1304 of this title, such exportation or destruction shall not exempt such articles from the payment of duties other

than the marking duty provided for in such subsection (c).

(June 17, 1930, ch. 497, title IV, § 558, 46 Stat. 744; June 25, 1938, ch. 679, § 24, 52 Stat. 1088.)

### § 1559. Warehouse goods deemed abandoned after 5 years

Merchandise upon which any duties or charges are unpaid, remaining in bonded warehouse beyond 5 years from the date of importation, shall be regarded as abandoned to the Government and shall be sold under such regulations as the Secretary of the Treasury shall prescribe, and the proceeds of sale paid into the Treasury, as in the case of unclaimed merchandise covered by section 1493 of this title, subject to the payment to the owner or consignee of such amount, if any, as shall remain after deduction of duties, charges, and expenses. Merchandise upon which all duties and charges have been paid, remaining in bonded warehouse beyond 5 years from the date of importation, shall be held to be no longer in the custody or control of the officers of the customs.

(June 17, 1930, ch. 497, title IV, § 559, 46 Stat. 744; June 25, 1938, ch. 679, § 23(a), 52 Stat. 1088; Oct. 3, 1978, Pub. L. 95-410, title I, § 108(b)(1), 92 Stat. 892.)

### § 1560. Leasing of warehouses

The Secretary of the Treasury may cause to be set aside any available space in a building used as a customhouse for the storage of bonded merchandise or may lease premises for the storage of unclaimed merchandise or other imported merchandise required to be stored by the Government, and set aside a portion of such leased premises for the storage of bonded merchandise: *Provided*, That no part of any premises owned or leased by the Government may be used for the storage of bonded merchandise at any port at which a public bonded warehouse has been established and is in operation. All the premises



so leased shall be leased on public account and the storage and other charges shall be deposited and accounted for as customs receipts, and the rates therefor shall not be less than the charges for storage and similar services made at such port of entry by commercial concerns for the storage and handling of merchandise. No officer of the customs shall own, in whole or in part, any bonded warehouse or enter into any contract or agreement for the lease or use of any building to be thereafter erected as a public store or warehouse. No lease of any building to be so used shall be taken for a longer period than three years, nor shall rent for any such premises be paid, in whole or in part, in advance.

(June 17, 1930, ch. 497, title IV, § 560, 46 Stat. 745; June 2, 1970, Pub. L. 91-271, title III, § 301(u), 84 Stat. 290.)

### § 1561. Public stores

Any premises owned or leased or leased by the Government and used for the storage of merchandise for the final release of which from customs custody a permit has not been issued shall be known as a "public store."

(June 17, 1930, ch. 497, title IV, § 561, 46 Stat. 745.)

### § 1562. Manipulation in warehouse

Unless by special authority of the Secretary of the Treasury, no merchandise shall be withdrawn from bonded warehouse in less quantity than an entire bale, cask, box, or other package; or, if in bulk, in the entire quantity imported or in a quantity not less than one ton weight. All merchandise so withdrawn shall be withdrawn in the original packages in which imported unless, upon the application of the importer, it appears to be the appropriate customs officer that it is necessary to the safety or preservation of the merchandise to repack or transfer the same: *Provided*, That upon permis-

sion therefor being granted by the Secretary of the Treasury, and under customs supervision, at the expense of the proprietor, merchandise may be cleaned, sorted, repacked, or otherwise changed in condition, but not manufactured, in bonded warehouses established for that purpose and be withdrawn therefrom for exportation to a foreign country or for shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or the island of Guam, without payment of the duties, or for consumption, upon payment of the duties accruing thereon, in its condition and quantity, and at its weight, at the time of withdrawal from warehouse, with such additions to or deductions from the final appraised value as may be necessary by reason of change in condition. The basis for the assessment of duties on such merchandise so withdrawn for consumption shall be the adjusted final appraised value, and if the rate of duty is based upon or regulated in any manner by the value of the merchandise, such rate shall be based upon or regulated by such adjusted final appraised value. The scouring or carbonizing of wool shall not be considered a process of manufacture within the provisions of this section. Under such regulations as the Secretary of the Treasury shall prescribe, imported merchandise which has been entered and which has remained in continuous customs custody may be manipulated in accordance with the provisions of this section under customs supervision and at the risk and expense of the consignee, but elsewhere than in a bonded warehouse, in cases where neither the protection of the revenue nor the proper conduct of customs business requires that such manipulation be done in bonded warehouse.

(June 17, 1930, ch. 497, title IV, § 562, 46 Stat. 745; June 25, 1938, ch. 679, §§ 2, 25, 52 Stat. 1077, 1088; Aug. 8, 1953, ch. 397, § 18(f), 67 Stat. 518; June 30, 1955, ch. 258, § 2(a)(5), 69 Stat. 242; June 2, 1970, Pub. L. 91-271, title III, § 301(b), 84 Stat. 287.)



## § 1563. Allowance for loss, abandonment of warehouse goods

### (a) Abatement or allowance for deterioration, loss or damage to merchandise in customs custody; exception

In no case shall there be any abatement or allowance made in the duties for any injury, deterioration, loss, or damage sustained by any merchandise while remaining in customs custody, except that the Secretary of the Treasury is authorized, upon production of proof satisfactory to him of the loss or theft of any merchandise while in the appraiser's stores, or of the actual injury or destruction, in whole or in part, of any merchandise by accidental fire or other casualty, while in bonded warehouse, or in the appraiser's stores, or while in transportation under bond, or while in the custody of the officers of the customs, although not in bond, or while within the limits of any port of entry and before having been landed under the supervision of the officers of the customs, to abate or refund, as the case may be, the duties upon such merchandise, in whole or in part, and to pay any such refund out of any moneys in the Treasury not otherwise appropriated, and to cancel any warehouse bond or bonds, or enter satisfaction thereon in whole or in part, as the case may be, but no abatement or refund shall be made in respect of injury or destruction of any merchandise in bonded warehouse occurring after the expiration of three years from the date of importation. The decision of the Secretary of the Treasury as to the abatement or refund of the duties on any such merchandise shall be final and conclusive upon all persons.

The Secretary of the Treasury is authorized to prescribe such regulations as he may deem necessary to carry out the provisions of this subdivision and he may by such regulations limit the time within which proof of loss, theft, injury, or destruction shall be submitted, and may provide for the abatement or refund of duties,

as authorized herein, by appropriate customs officers in cases in which the amount of the abatement or refund claimed is less than $25 and in which the importer has agreed to abide by the decision of the customs officer. The decision of the customs officer in any such case shall be final and conclusive upon all persons.

**(b) Abandonment of merchandise to Government; remittal or refund of duties paid**

Under such regulations as the Secretary of the Treasury may prescribe and subject to any conditions imposed thereby the consignee may at any time within three years from the date of original importation, abandon to the Government any merchandise in bonded warehouse, whereupon any duties on such merchandise may be remitted or refunded as the case may be, but any merchandise so abandoned shall not be less than an entire package and shall be abandoned in the original package without having been repacked while in a bonded warehouse (other than a bonded manipulating warehouse).

(June 17, 1930, ch. 497, title IV, § 563, 46 Stat. 746; June 25, 1938, ch. 679, § 23(a), 52 Stat. 1088; June 2, 1970, Pub. L. 91-271, title III, § 301(v), 84 Stat. 290.)

**§1564. Liens**

Whenever a customs officer shall be notified in writing of the existence of a lien for freight, charges, or contribution in general average upon any imported merchandise sent to the appraiser's store for examination, entered for warehousing or taken possession of by him, he shall refuse to permit delivery thereof from public store or bonded warehouse until proof shall be produced that the said lien has been satisfied or discharged. The rights of the United States shall not be subjected or affected by the filing of such lien, nor shall the United States or its officers be liable for losses or damages consequent upon such refusal to permit delivery. If merchandise, regarding which such notice of lien has been filed, shall be forfeited or abandoned and sold, the freight, charges, or contribution in general average due thereon shall be paid from the proceeds of such sale in the same manner as other lawful charges and expenses are paid therefrom.



(June 17, 1930, ch. 497, title IV, § 564, 46 Stat. 747; June 2, 1970, Pub. L. No. 91-271, title III, § 301(w), 84 Stat. 290.)

**§ 1565. Cartage**

The cartage of merchandise entered for warehouse shall be done by cartmen to be appointed and licensed by the appropriate customs officer and who shall give a bond in a penal sum to be fixed by such customs officer, for the protection of the Government against any loss of, or damage to, such merchandise while being so carted. The cartage of merchandise designated for examination at the appraiser's stores and of merchandise taken into custody by the customs officer as unclaimed shall be performed by such persons as may be designated, under contract or otherwise, by the Secretary of the Treasury, and under such regulations for the protection of the owners thereof and of the revenue as the Secretary of the Treasury shall prescribe.

(June 17, 1930, ch. 497, title IV, § 565, 46 Stat. 747; June 2, 1970, Pub. L. 91-271, title III, § 301(x), 84 Stat. 290.)

## ARTICLE 12, GENERAL STATUTES OF NORTH CAROLINA

§ 105-274. Property subject to taxation.—(a) All property, real and personal, within the jurisdiction of the State shall be subject to taxation unless it is:

(1) Excluded from the tax base by a statute of statewide application enacted under the classification power accorded the General Assembly by Article V, § 2(2), of the North Carolina Constitution, or

(2) Exempted from taxation by the Constitution or by a statute of statewide application enacted under the authority granted the General Assembly by Article V, § 2(3), of the North Carolina Constitution.

(b) No provision of this Subchapter shall be construed to exempt from taxation any property situated in this State belonging to any foreign corporation unless the context of the provision clearly indicates a legislative intent to grant such an exemption. (1939, c. 310, ss. 303, 1800; 1961, c. 1169, s. 8; 1967, c. 1185; 1971, c. 806, s. 1.)



## TITLE 19, CODE OF FEDERAL REGULATIONS (1983)

**§ 19.1 Classes of customs warehouses.**

(a) Customs warehouses shall be designated according to the following classifications:

(1) *Class 1.* Premises owned or leased by the Government and used for the storage of merchandise undergoing examination of the Customs Officer, under seizure, or pending final release from Customs custody.[1] Unclaimed merchandise stored in such premises shall be held under "general order." [2]

When such premises are not sufficient or available for the storage of seized and unclaimed goods, such goods

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[1] "Any premises owned or leased by the Government and used for the storage of merchandise for the final release of which from customs custody a permit has not been issued shall be known as a 'public storage.' " (Tariff Act of 1930, sec. 561; 19 U.S.C. 1561)

[2] "The Secretary of the Treasury may cause to be set aside any available space in a building used as a customhouse for the storage of bonded merchandise or may lease premises for the storage of unclaimed merchandise or other imported merchandise required to be stored by the Government, and set aside a portion of such leased premises for the storage of bonded merchandise: *Provided,* That no part of any premises owned or leased by the Government may be used for the storage of bonded merchandise at any port at which a public bonded warehouse has been established and is in operation. All the premises so leased shall be leased on public account and the storage and other charges shall be deposited and accounted for as customs receipts, and the rates therefor shall not be less than the charges for storage and similar services made at such port of entry by commercial concerns for the storage and handling of merchandise. No collector or other officer of the customs shall own, in whole or in part, any bonded warehouse or enter into any contract or agreement for the lease or use of any building to be thereafter erected as a public store or warehouse. No lease of any building to be so used shall be taken for a longer period than three years, nor shall rent for any such premises be paid, in whole or in part, in advance." (Tariff Act of 1930, sec. 560; 19 U.S.C. 1560)

may be stored in a warehouse of class 3, 4, or 5. So far as such warehouses are used for this purpose, they shall be designated "bonded stores." If there are no warehouses of these classes available, the district director may, with the approval of Headquarters, U.S. Customs Service, rent suitable premises for the storage of seized and unclaimed goods.[3]

(2) *Class 2.* Importers' private bonded warehouses used exclusively for the storage of merchandise belonging or consigned to the proprietor thereof. A warehouse of class 4 or 5 may be bonded exclusively for the storage of goods imported by the proprietor thereof, in which case it shall be known as a private bonded warehouse.

(3) *Class 3.* Public bonded warehouses used exclusively for the storage of imported merchandise.

(4) *Class 4.* Bonded yards or sheds for the storage of heavy and bulky imported merchandise; stables, feeding pens, corrals, or other similar buildings or limited enclosures for the storage of imported animals; and tanks for the storage of imported liquid merchandise in bulk. If the district director deems it necessary, the yards shall be enclosed by substantial fences with entrances and exit gates capable of being secured by the proprietor's locks. The inlets and outlets to tanks shall be secured by means of seals or the proprietor's locks.

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[3] "Buildings or parts of buildings and other inclosures may be designated by the Secretary of the Treasury [Commissioner of Customs] as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the collector, or under seizure, or for the manufacture of merchandise in bond, or for the repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. * * *" (Tariff Act of 1930, sec. 555; 19 U.S.C. 1555)



(5) *Class 5.* Bonded bins or parts of buildings or of elevators to be used for the storage of grain. The bonded portions shall be effectively separated from the rest of the building.

(6) *Class 6.* Warehouses for the manufacture in bond, solely for exportation, of articles made in whole or in part of imported materials or of materials subject to internal-revenue tax; and for the manufacture for home consumption or exportation of cigars in whole of tobacco imported from one country.[4]

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[4] "All articles manufactured in whole or in part of imported materials, or of materials subject to internal-revenue tax, and intended for exportation without being charged with duty, and without having an internal-revenue stamp affixed thereto, shall, under such regulations as the Secretary of the Treasury may prescribe, in order to be so manufactured and exported, be made and manufactured in bonded warehouses similar to those known and designated in Treasury Regulations as bonded warehouses, class six: *Provided*, That the manufacturer of such articles shall first give satisfactory bonds for the faithful observance of all the provisions of law and of such regulations as shall be proscribed by the Secretary of the Treasury:

*Provided, further*, That the manufacture of distilled spirits from grain, starch, molasses, or sugar, including all dilutions or mixtures of them or either of them shall not be permitted in such manufacturing warehouses.

"Whenever goods manufactured in any bonded warehouse established under the provisions of the proceding paragraph shall be duly laden for transportation and immediate exportation under the supervision of the proper officer who shall be duly designated for that purpose, such goods shall be exempt from duty and from the requirements relating to revenue stamps.

"No flour, manufactured in a bonded manufacturing warehouse from wheat imported after ninety days from the date of the enactment of this Act shall be withdrawn from such warehouse for exportation without payment of a duty on such imported wheat equal to any reduction in duty which by treaty will apply in respect of such flour in the country to which it is to be exported.

"Any materials used in the manufacture of such goods, and any packages, coverings, vessels, brands, and labels used in putting up

the same may, under the regulations of the Secretary of the Treasury, be conveyed without the payment of revenue tax or duty into any bonded manufacturing warehouse, and imported goods may, under the aforesaid regulations be transferred without the exaction of duty from any bonded warehouse into any bonded manufacturing warehouse; but this privilege shall not be held to apply to implements, machinery, or apparatus to be used in the construction or repair of any bonded manufacturing warehouse or for the prosecution of the business carried on therein.

"Articles or materials received into such bonded manufacturing warehouse or articles manufactured therefrom may be withdrawn or removed therefrom for direct shipment and exportation or for transportation and immediate exportation in bond to foreign countries or to the Philippine Islands under the supervision of the officer duly designated therefor by the collector of the port, who shall certify to such shipment and exportation, or ladening for transportation, as the case may be, describing the articles by their mark or otherwise, the quantity, the date of exportation, and the name of the vessel: *Provided*, That the by-products incident to the processes of manufacture, including waste derived from cleaning rice in bonded warehouses under the Act of March 24, 1874, in said bonded warehouses may be withdrawn for domestic consumption on the payment of duty equal to the duty which would be assessed and collected by law if such waste or by-products were imported from a foreign country: *Provided*, That all waste material may be destroyed under Government supervision. All labor performed and services rendered under these provisions shall be under the supervision of a duly designated officer of the customs and at the expense of the manufacturer.

"A careful account shall be kept by the collector of all merchandise delivered by him to any bonded manufacturing warehouse, and a sworn monthly return, verified by the customs officers in charge, shall be made by the manufacturer containing a detailed statement of all imported merchandise used by him in the manufacture of exported articles.

"Before commencing business the proprietor of any manufacturing warehouse shall file with the Secretary of the Treasury a list of all the articles intended to be manufactured in such warehouse, and state the formula of manufacture and the names and quantities of the ingredients to be used therein.

"Articles manufactured under these provisions may be withdrawn under such regulations as the Secretary of the Treasury may



(7) *Class 7.* Warehouses bonded for smelting and refining imported metal-bearing materials for exportation or domestic consumption.[5]

prescribe for transportation and delivery into any bonded warehouse at an exterior port for the sole purpose of immediate export therefrom: *Provided*, That cigars manufactured in whole of tobacco imported from any one country, made and manufactured in such bonded manufacturing warehouses, may be withdrawn for home consumption upon the payment of the duties on such tobacco in its condition as imported under such regulations as the Secretary of the Treasury may prescribe and the payment of the internal-revenue tax accruing on such cigars in their condition as withdrawn, and the boxes or packages containing such cigars shall be stamped to indicate their character, origin of tobacco from which made, and place of manufacture.

"The provisions of section 3433 of the Revised Statutes shall, so far as may be practicable, apply to any bonded manufacturing warehouse established under this Act and to the merchandise conveyed therein.

"Distilled spirits and wines which are rectified in bonded manufacturing warehouses, class six, and distilled spirits which are reduced in proof and bottled in such warehouses, shall be deemed to have been manufactured within the meaning of this section, and may be withdrawn as hereinbefore provided, and likewise for shipment in bond to Puerto Rico, subject to the provisions of this section, and under such regulations as the Secretary of the Treasury may prescribe, there to be withdrawn for consumption or be rewarehoused and subsequently withdrawn for consumption: *Provided*, That upon withdrawal in Puerto Rico for consumption, the duties imposed by the customs laws of the United States shall be collected on all imported merchandise (in its condition as imported) and imported containers used in the manufacture and putting up of such spirits and wines in such warehouses: *Provided further*, That no internal-revenue tax shall be imposed on distilled spirits and wines rectified in class six warehouses if such distilled spirits and wines are exported or shipped in accordance with the provisions of this section, and that no person rectifying distilled spirits or wines in such warehouses shall be subject by reason of such rectification to the payment of special tax as a rectifier." (Tariff Act of 1930, sec. 311, as amended, 19 U.S.C. 1311)

[5] "(a) Any plant engaged in smelting or refining, or both, of metal-bearing materials as defined in this section may, upon the

(8) *Class 8.* Bonded warehouse established for the purpose of cleaning, sorting, repacking, or otherwise changing in condition, but not manufacturing, imported merchandise, under Customs supervision and at the expense of the proprietor.[6]

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giving of satisfactory bond, be designated a bonded smelting or refining warehouse. * * *" (Tariff Act of 1930, sec. 312, as amended; 19 U.S.C. 1312.)

[6] "Unless by special authority of the Secretary of the Treasury, no merchandise shall be withdrawn from bonded warehouse in less quantity than an entire bale, cask, box, or other package; or, if in bulk, in the entire quantity imported or in a quantity not less than one ton weight. All merchandise so withdrawn shall be withdrawn in the original packages in which imported unless, upon the application of the importer, it appears to the collector that it is necessary to the safety or preservation of the merchandise to repack or transfer the same: *Provided,* That upon permission therefor being granted by the Secretary of the Treasury, and under customs supervision, at the expense of the proprietor, merchandise may be cleaned, sorted, repacked, or otherwise changed in condition, but not manufactured, in bonded warehouses established for that purpose and be withdrawn therefrom for exportation to a foreign country or for shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or the island of Guam, without payment of the duties, or for consumption, upon payment of the duties accruing thereon, in its condition and quantity and at its weight, at the time of withdrawal from warehouse with such additions to or deductions from the final appraised value as may be necessary by reason of change in condition. The basis for the assessment of duties on such merchandise so withdrawn for consumption shall be the adjusted final appraised value, and if the rate of duty is based upon or regulated in any manner by the value of the merchandise, such rate shall be based upon or regulated by such adjusted final appraised value. The scouring or carbonizing of wool shall not be considered a process of manufacture within the provisions of this section. Under such regulations as the Secretary of the Treasury shall prescribe imported merchandise which has been entered and which has remained in continuous customs custody may be manipulated in accordance with the provisions of this section under customs supervision and at the risk and expense of the consignee, but elsewhere than in a bonded warehouse, in cases where neither the protection



(b) The whole or a part of any warehouse of class 1, 2, 3, 4, 5, 6, or 7 may be designated a constructive manipulation (class 8) warehouse when the exigencies of the service so require.

(c) *Construction:* When parts of buildings are used as Customs bonded warehouses, the bonded and non-bonded portions thereof shall be effectively separated by partitions of substantial materials and construction erected in such a manner as to render it impossible for unauthorized personnel to enter the premises without such violence as to make the entry easy to detect. The partitions may be constructed of raised expanded metal (steel), steel chain-link fence fabric, or wood materials and shall comply with the following specifications:

(1) *Expanded metal.* The expanded metal shall be at least 9 gauge (of a diameter of .148 inches), with mesh openings not to exceed 2 inches in the larger dimension, and shall be welded to corner posts of at least 3x3x5/16 inch angle iron. The intermediate posts shall be at least 2x2x3/16 inch angle iron. Top, middle, and bottom rails of at least 2x2x3/16 inch angle iron are required.

(2) *Steel chain-link fence.* Steel chain-link fence fabric shall be at least 9 gauge of a diameter of .148 inches) with mesh openings not to exceed 2 inches in the larger dimension. The wire mesh must be installed on a galvanized steel tubular frame consisting of 2⅞ inch outer diameter (O.D.) corner and gate posts, 2⅜ inch O.D. intermediate posts and 1⅝ inch O.D. top, middle, and bottom rails. The posts shall be affixed to the true floor and true ceiling in a manner which precludes their easy removal. The chain-link fabric shall be securely fastened

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of the revenue nor the proper conduct of customs business requires that such manipulation be done in a bonded warehouse." (Tariff Act of 1930, sec. 562, as amended; 19 U.S.C. 1562)

to all corner posts using 3 1/6x3/4 inch tension bars and 11 gauge tension bands. There shall be one band for each foot in the height of the fence fabric. The bolts used to affix these bands to the fence shall be bent, peened, welded or altered to preclude the removal of the nut from the bolt. The fabric shall be fastened to the intermediate posts and top, middle, and bottom rails with 9 gauge tie wires, double wrapped, on one foot centers. In those cases where more than one width of fence fabric is required there shall be an overlap of at least one foot.

(3) *Wood.* Wood partitions shall be constructed of not less than 1 inch boards (dressed if desired) of uniform length between supports, nailed with not less than ten penny nails to not less than 2x4 inch stud framing and held in place by ⅛x2 inch metal cover-strips secured over the nailed ends, with carriage bolts through the boards and partition framing. Plywood of not less than ¾ inch thickness may be substituted for the 1 inch thick wood boards providing it is erected in the same manner prescribed for the boards. Gates may be constructed of any of the materials specified for partitions. Depending on their size and swing, the gates shall be constructed in such a manner, and of materials of sufficient strength, to preclude any possible sagging condition. The specifications set forth in this paragraph shall be applicable to all partitions (including gates) constructed, reconstructed, renovated, or otherwise installed or altered on or after October 28, 1976.

(Secs. 311, 312, 555, 556, 557, 560, 561, 562, 46 Stat. 691), as amended, 692, as amended, 743, 744, as amended, 745, as amended; 19 U.S.C. 1311, 1312, 1555, 1556, 1557, 1560, 1561, 1562)

[T.D. 76-277, 4 FR 42649, Sept. 28, 1976, as amended by T.D. 82-204, 47 FR 49368, Nov. 1, 1982]





**§ 19.2 Applications to bond; bond; annual fee.**

(a) *Application.* An owner or lessee desiring to establish a bonded warehouse facility shall make written application to the district director wherein the warehouse is located, describing the premises, giving its location, and stating the class of warehouse desired. The application shall be accompanied by the fee required by § 19.5 of this chapter to establish a warehouse. If required by the district director, the applicant shall provide a list of names and addresses of all officers and managing officials of the warehouse and all persons who have a direct or indirect financial interest in the operation of the warehouse facility. Except in the case of a class 2 or class 7 warehouse, the application shall state whether the warehouse facility is to be operated only for the storage or treatment of merchandise belonging to the applicant or whether it is to be operated as a public bonded warehouse. If the warehouse facility is to be operated as a private bonded warehouse, the application also shall state the general character of the merchandise to be stored therein, and provide an estimate of the maximum duties and taxes which will be due on all merchandise in the bonded warehouse at any one time. A warehouse facility will be determined by street address, location, or both. For example, if a proprietor has two warehouses located at one street address and three warehouses located at three different street addresses the two located at one address would be considered as one warehouse facility and the three located at three different addresses would each by considered as separate warehouse facilities. A warehouse facility shall be charged an annual fee as prescribed by section 19.5 of this chapter which will be paid to the Regional Commissioner within 14 days after the due date.

(b) The applicant shall submit evidence of fire insurance coverage on the proposed warehouse. If the applicant does not have fire insurance for the proposed warehouse, he shall submit a certificate signed by an officer or agent of each of two insurance companies stating that the building is acceptable for fire-insurance purposes. The application shall also be accompanied by a blueprint showing measurements, openings, etc., of the building or space to be bonded. If the warehouse to be bonded is a tank, the blueprint shall show all outlets, inlets, and pipe lines and shall be certified as correct by the proprietor of the tank. A gauge table showing the capacity of the tank in United States gallons per inch or fraction of an inch of height, certified by the proprietor to be correct, shall accompany the application. When a part or parts of a building are to be used as the warehouse, there shall be given a detailed description of the materials and construction of all partitions. When the proprietor is the lessee of the premises covered by the application and bond, he shall furnish a stipulation concurred in by the sureties, agreeing that, prior to the expiration of the lease covering the premises without renewal thereof, he will (1) transfer any merchandise remaining in the bonded warehouse to an approved bonded warehouse, (2) pay all duties, charges, or exactions due on such merchandise, or (3) otherwise dispose of such merchandise in accordance with the Customs laws and regulations.

(c) *Bond, generally.* On approval of the application to bond a warehouse of class 2, 3, 4, 5, or 8, a bond shall be executed in the form prescribed by T.D. 82-204.

(d) *Bond for proprietor's manufacturing warehouse, class 6, and bonded smelting and refining warehouse, class 7.* On approval of the application to bond a proprietor's manufacturing warehouse, class 6, a bond shall be executed in the form prescribed by T.D. 82-204. In the case of a bonded smelting and refining warehouse, class 7, the



bond shall be executed with the required number of copies and in the form prescribed by T.D. 82-204.

(e) Any proprietor of a bonded warehouse may be required on 10 days' notice from the district director to furnish a new proprietor's warehouse bond; and if he fails to do so, no more goods shall be sent to the warehouse and those therein shall be removed at the expense of such proprietor. A new bond is required if the bonded warehouse is substantially altered or rebuilt.

(f) As a condition of approval of the application, the district director may order an inquiry by a Customs officer into the qualification, character, and experience of the applicant (e.g. personal history, financial and business data, credit and personal references), and into the security, suitability, and fitness of the facility.

(g) The district director shall promptly notify the applicant in writing of his decision to approve or deny the application to bond the warehouse. If the application is denied the notification shall state the grounds for denial which need not be limited to those set forth in § 19.3(e). The applicant may seek review of the decision to deny under the provisions of § 19.3(f) of this chapter within 10 days after notification.

(Secs. 555, 556, 46 Stat. 743; 19 U.S.C. 1555, 1556)

[28 FR 14763, Dec. 31, 1963, as amended by T.D. 56393, 30 FR 5580, Apr. 20, 1965; T.D. 78-80, 43 FR 10685, Feb. 15, 1978; T.D. 82-204, 47 FR 49368, Nov. 1, 1982]

### § 19.3 Bonded warehouses alterations; relocation; suspensions; discontinuance.

(a) *Alterations or relocation.* Alterations to or relocation of a warehouse within the same district may be made with the permission of the district director of the district in which the facility is located. An application to alter or

relocate a bonded warehouse shall be accompanied by the fee required by § 19.5 of this chapter.

(b) *Suspensions.* The use of all or part of a bonded warehouse or bonded floor space may be temporarily suspended by the district director for a period not to exceed one year on written application of the proprietor if there are no bonded goods in the area. Upon written application of the proprietor and upon the removal of all nonbonded goods, if any, the premises may again be used for the storage of bonded goods. If the application is approved, the district director shall indicate the approval by endorsement on the application. Rebonding will not be necessary as long as the original bond remains in force.

(c) *Discontinuance.* If a proprietor wishes to discontinue the bonded status of the warehouse, he shall make written application to the district director. The district director shall not approve the application until all goods in the warehouse are transferred to another bonded warehouse without expense to the Government. To reestablish the bonded warehouse, application shall be made and approved under the provision of § 19.2 of this chapter.

(d) *Employee lists.* The district director may make a written demand upon the proprietor to submit, within 30 days after the date of demand, a written list of the names, addresses, social security numbers, and dates and places of birth of all persons employed by the proprietor in the carriage, receiving, storage, or delivery or any bonded merchandise. If a list has been previously furnished the proprietor shall advise the district director in writing of the names, addresses, social security numbers, and dates and places of birth of any new personnel employed by him in the carriage, receiving, storage, or delivery of bonded merchandise within 10 days after such employment. For the purpose of this part a person shall not be deemed to be employed by a warehouse proprietor if he is an officer or employee of an independent contrac-



tor engaged by the warehouse proprietor to load, unload, transport, or otherwise handle bonded merchandise.

(e) *Revocation or suspension for cause.* The district director may revoke or suspend for cause the right of a proprietor to continue the bonded status of the warehouse for any ground specified in this paragraph. An action to suspend or revoke the right to operate a bonded warehouse shall be taken in accordance with the procedures set forth in paragraph (f) of this section. If the bonded status is revoked or suspended for cause, the district director shall require all goods in the warehouse to be transferred to a bonded warehouse without expense to the Government. The bonded status of a warehouse may be revoked or suspended for cause if:

(1) The approval of the application to bond the warehouse was obtained through fraud or the misstatement of a material fact;

(2) The warehouse proprietor refuses or neglects to obey any proper order of a Customs officer or any Customs order, rule, or regulation relative to the operation or administration of a bonded warehouse;

(3) The warehouse proprietor or an officer of a corporation which has been granted the right to operate a bonded warehouse is convicted of or has committed acts which would constitute a felony, or a misdemeanor involving theft, smuggling, or a theft-connected crime;

(4) The warehouse proprietor does not provide secured facilities or properly safeguard merchandise within the bonded warehouse;

(5) The warehouse proprietor fails to furnish a current list of names, addresses, and other information required by § 19.3(d);

(6) The bond required by § 19.2(c) or (d) of this chapter is determined to be insufficient in amount or

lacking sufficient sureties, and a satisfactory new bond with goods and sufficient sureties is not furnished within a reasonable time;

(7) Bonded merchandise has not been stored in the warehouse for a period of 2 year; or

(8) The warehouse proprietor or an employee of the warehouse proprietor discloses proprietary information in, or proprietary information contained on, documents to be included in the permit file folder to an unauthorized person.

(f) *Procedure for revocation or suspension for cause.* The district director may at any time serve notice in writing upon any proprietor of a bonded warehouse to show cause why his right to continue the bonded status of his warehouse should not be revoked or suspended for cause. Such notice shall advise the proprietor of the grounds for the proposed action and shall afford the proprietor an opportunity to respond in writing within 30 days. Thereafter, the district director shall consider the allegations and responses made by the proprietor unless the proprietor in his response requests a hearing. If a hearing is requested, it shall be held before a hearing officer designated by the Commissioner of Customs or his designee within 30 days following the proprietor's request. The proprietor may be represented by counsel at such hearing, and all evidence and testimony of witnesses in such proceedings, including substantiation of the allegations and the responses thereto shall be presented, with the right of cross-examination to both parties. A stenographic record of any such proceeding shall be made and a copy thereof shall be delivered to the proprietor of the warehouse. At the conclusion of the hearing, the hearing officer shall promptly transmit all papers and the stenographic record of the hearing to the Regional Commissioner together with his recommendation for final action. The proprietor may submit in writing additional views



or arguments to the Regional Commissioner following a hearing on the basis of the stenographic record, within 10 days after delivery to him of a copy of such record. The Regional Commissioner shall thereafter render his decision in writing, stating his reasons therefor. Such decision shall be served on the proprietor of the warehouse, and shall be considered the final administrative action.

[T.D. 82-204, 47 FR 49369, Nov. 1, 1982]

### § 19.4 Customs supervision over warehouses.

The character and extent of Customs supervision to be exercised in connection with any warehouse facility or transaction provided for in this part shall be in accordance with § 161.1 of this chapter. Independent of any need to appraise or classify merchandise, the district director may authorize a Customs officer to supervise any transaction or procedure at the bonded warehouse facility. Such supervision may be performed through periodic audits of the warehouse proprietor's records, quantity counts of goods in warehouse inventories, spot checks of selected warehouse transactions or procedures or reviews of conditions of recordkeeping, security, or storage in a warehouse facility. The warehouse proprietor shall permit access to the warehouse by any Customs officer.

[T.D. 82-204, 47 FR 49370, Nov. 1, 1982]

### § 19.5 Fees.

Each warehouse proprietor will be charged a fee to establish, alter, or relocate a warehouse facility which shall be determined under the provisions of 31 U.S.C. 483a. Each warehouse proprietor granted the right to operate a warehouse facility shall be charged an annual fee which shall be determined under the provisions of 19

U.S.C. 1555. The fees will be revised annually and published in the FEDERAL REGISTER and Customs Bulletin.

[T.D. 82-204, 47 FR 49370, Nov. 1, 1982]

### § 19.6 Deposits, withdrawals, partial releases and sealing requirements.

(a) (1) *Deposit in warehouse.* The district director may authorize the deposit of merchandise in designated bonded warehouses, without physical supervision by a Customs officer. Goods for which a warehouse or rewarehouse entry has been accepted, according to the procedures in Part 144, Subpart B, of this chapter, shall be examined or inspected at the place of unlading, bonded warehouse, or other location as ordered by the district director. When merchandise is deposited in a proprietor's warehouse the proprietor will be responsible for the quantity and condition of merchandise reflected on entry documentation adjusted by (i) any allowance made under Part 158, Subparts A and B, of this chapter by the district director, and (ii) any discrepancy report made jointly on the appropriate cartage documents as set forth in § 125.31 of this chapter by the warehouse proprietor and the bonded carrier or licensed cartman or lighterman delivering the goods to the warehouse, or an independent weigher, gauger, measurer, and signed by an authorized representative of the above within 15 calendar days after deposit. A copy of any joint report of discrepancy shall be made within two business days of agreement and provided to the district director on the appropriate cartage documents as set forth in § 125.31 of this chapter.

(2) *Allowance after deposit.* After merchandise has been deposited in the warehouse the proprietor's liability may be further modified by any adjustment for duties allowed by the district director for concealed shortages (i.e., § 158.5(a)), casualty loss (i.e., Part 158, Subpart C), destruction (i.e., § 158.43), or manipulation (i.e., § 19.11, 19 U.S.C. 1562).



(b) (1) *Withdrawal and removal from warehouse.* The district director may authorize the withdrawal and removal of merchandise, without physical supervision or examination by a Customs officer under permit issued under the procedure set forth in § 144.39 of this chapter. When a withdrawal or removal is not physically supervised by a Customs officer, the warehouse proprietor will be relieved of responsibility only for the merchandise in its warehouse in the condition and quantity as shown on the application for withdrawal or removal. In the case of merchandise to be carted or transported in bond from the warehouse, the proprietor will be relieved of responsibility only if it receives the signed receipt on the withdrawal or removal document of the carrier named in the document. The proprietor's responsibility may be adjusted by any discrepancy report made jointly by the warehouse proprietor, and the licensed cartman or lighterman, bonded carrier, weigher, gauger, or measurer and signed by the authorized representative of the above within 15 calendar days after removal from the warehouse. The adjustments shall be noted on the permit copy of the withdrawal or removal document. A copy of any joint report of discrepancy shall be promptly provided to the district director.

(2) *Retention in warehouse after withdrawal.* Merchandise for which a permit for withdrawal has been issued, whether duty-paid or not, need not be physically removed from the warehouse. However, such merchandise must be segregated or physically marked to maintain its identity as merchandise for which a withdrawal permit has been issued. Duty-paid or unconditionally duty-free merchandise which has been withdrawn, but not removed, from a warehouse is no longer deemed to be in Customs custody. All other goods which have been withdrawn, but not removed, remain in Customs custody until the end of the 5-year warehouse entry bond period.

(c) *Customs determination of liability.* When a Customs officer physically supervises the deposit or removal

of merchandise under paragraphs (a)(1) or (b)(1) of this section, the Customs officer's report of merchandise received or removed shall be determinative of the quantity and condition of merchandise received or removed from the warehouse for Customs purposes.

(d) *Partial releases*—(1) *Generally.* Goods in Customs custody may be withdrawn without payment of duty when permitted by law within the same port by blanket withdrawal and thereafter removed from the warehouse in partial releases by the warehouse proprietor. Blanket withdrawals are not authorized for transportation in bond to another port. When a withdrawer desires to use the partial release procedure for all or part of the merchandise covered by a warehouse entry, he shall submit to the district director a blanket withdrawal on the appropriate withdrawal form. The form shall bear the words "BLANKET WITHDRAWAL" in capital letters conspicuously printed or stamped in the top margin. The summary statement described in § 144.32 of this chapter shall not be included. Merchandise for which a duty-paid withdrawal is required is not eligible for the partial release procedure under this section, except as provided in § 10.62(e) of this chapter.

(2) *Form Distribution.* The blanket withdrawal shall be executed in triplicate, or in quadruplicate if an additional copy is required for control purposes in local administration. Upon approval of the blanket withdrawal by the district director, the original shall be returned to the withdrawer for forwarding to the warehouse proprietor to serve as a permit to withdraw the merchandise covered therein upon the filing of requests for partial release under subparagraph (e) of this section. The original shall be retained in the warehouse proprietor's records, as provided in § 19.12(a)(2). One copy shall be returned to the withdrawer for use in preparing requests for partial release. One copy (statistical) shall be forwarded by Customs to the Bureau of the Census, where



applicable. Merchandise for which a blanket withdrawal has been approved may thereafter be released by the warehouse proprietor in the individual partial releases, but the goods are still in Customs custody while physically located in the warehouse.

(3) *Numbering of forms, discrepancy report.* Each partial release shall be documented by the withdrawer through presentation of a copy of the blanket withdrawal document to the warehouse proprietor, or by placing a copy in the proprietor's permit file folder. Each such release shall be consecutively numbered, and the number shall appear immediately after the serial number of the blanket withdrawal. Each copy shall bear the summary statement described in § 144.32 of this chapter. Any joint discrepancy report of the proprietor and the bonded carrier, licensed cartman or lighterman, or weigher, gauger, or measurer for a partial release shall be made on the copy. A copy of any joint report of discrepancy shall be within two business days provided to the district director. A copy of the partial release document shall be retained in the records of the warehouse proprietor, as provided in § 19.12(a)(2). The warehouse proprietor shall account for all goods covered by a blanket withdrawal through individual partial release documents before the permit file folder is transmitted to Customs under § 19.12(a)(4).

(4) *Quantity of release.* Partial releases may not be removed in a quantity of less than an entire package or, if in bulk, less than one ton in weight.

(e) *Affixing or breaking of seals.* The district director may authorize a warehouse proprietor to: (1) Break Customs in bond seals affixed under § 18.4 of this chapter, or under any Customs order or directive, on any vehicle or container of goods entered for warehouse upon arrival of the vehicle or container at the warehouse; or (2) affix Customs in bond seals to any vehicle or container of goods for which a withdrawal document has

been approved for movement in bond. The affixing or breaking of seals so authorized, shall be deemed to have been done under Customs supervision. The proprietor shall report to the district director any seal found, upon arrival of the vehicle or container at the warehouse, to be broken, missing, or improperly affixed, and hold the vehicle or container and its contents intact pending instructions from the district director.

[T.D. 82-204, 47 FR 49370, Nov. 1, 1982]

**§ 19.7 Expenses of labor and storage.**

(a) All merchandise deposited in public stores or in bonded warehouses shall be held liable for the expenses of labor and storage chargeable thereon at the customary rates and for all other expenses accruing upon the goods.

(b) The rates of storage and labor shall be agreed upon between the importer and the warehouse proprietor, but in case of disagreement the district director may, with the consent of all parties in interest, determine the rates to be charged.

(c) Except in cases provided for by § 141.102(d) of this chapter, when merchandise is stored in a public store under a warehouse entry, general order, or otherwise, the charges for storage due the Government shall be paid before the packages are delivered. The charges shall be based upon the existing bonded warehouse tariff of the port for storage and labor.

(Secs. 555, 556, 46 Stat. 743; 19 U.S.C. 1555, 1556)

[28 FR 14763, Dec. 31, 1963, as amended by T.D. 73-175, 38 FR 17446, July 2, 1973]

**§ 19.8 Examination of goods by importer; sampling; repacking; examination of merchandise by prospective purchasers.**

Importers may, upon application approved by the district director on Customs Form 3499 examine, sample,



and repack,[12] or transfer merchandise in bonded warehouse. Where there will be no interference with the orderly conduct of Customs business and no danger to the revenue prospective purchaser may be permitted to examine merchandise in bonded warehouses upon the written request of the owner, importer, consignee, or transferee.

(Secs. 555, 556, 562, 46 Stat. 743, 745, as amended; 19 U.S.C. 1555, 1556, 1562)

[28 FR 14763, Dec. 31, 1963, as amended by T.D. 82-204, 47 FR 49371, Nov. 1, 1982]

**§ 19.9 General order, abandoned, and seized merchandise.**

(a) *Acceptance of merchandise.* A proprietor of a general order warehouse shall accept general order, abandoned, or seized goods and articles into the warehouse only upon order of the district director on Customs Form 6043 (Delivery Ticket), as presented by the cartman or lighterman. A joint determination shall be made by the warehouse proprietor and the cartman or lighterman of the quantity and condition of the goods or articles so delivered to the warehouse. Any discrepancy between the quantity and condition of the goods and that reported on Customs Form 6043 shall be reported to the district director within two business days of agreement.

(b) *Recording and storing.* General order, abandoned, and seized goods and articles shall be recorded and stored in the warehouse as prescribed by § 19.12.

(c) *Release of merchandise.* Merchandise in general order may be released by the warehouse proprietor, after Customs inspection or examination as ordered by the district director, to the person named in a release order under § 141.11 of this chapter. The release may only be

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[12] Repacking shall be considered a manipulation within the purview of sec. 562, Tariff Act of 1930, as amended.

made by the proprietor upon presentation of a permit to release or delivery authorization signed by the appropriate Customs officer on Customs Form 3461, 7501, 5119-A, or other Customs form as designated by the district director. General order goods which have been unclaimed under § 127.11 of this chapter, voluntarily abandoned, or seized and forfeited may be released for transfer to the place of sale upon presentation to the warehouse proprietor of an approved copy of Customs Form 5251 (Order to Transfer Merchandise for Public Auction (Sale)), and an approved copy of Customs Form 6043 (Delivery Ticket). The quantity and condition of the goods so transferred shall be determined jointly by the proprietor and the cartman or lighterman picking up the goods for delivery to the place of sale. Any discrepancies shall be noted on the delivery ticket, a copy of which shall be sent to the district director within two business days of agreement. Seized goods that are released for a purpose other than sale may be released from warehouse only upon such written terms and conditions as directed by the district director.

[T.D. 82-204, 47 FR 49371, Nov. 1, 1982]

**§ 19.10 Examination packages.**

Merchandise sent from a bonded warehouse to the appraiser's stores for examination shall be returned by the district director to the warehouse for delivery unless the warehouse proprietor endorses the duty-paid permit to authorize delivery to another person.

[T.D. 82-204, 47 FR 49371, Nov. 1, 1982]

MANIPULATION IN BONDED WAREHOUSES AND ELSEWHERE

**§ 19.11 Manipulation in bonded warehouses and elsewhere.**

(a) So far as applicable, the general provisions of the regulations governing warehouses bonded for the storage



of imported merchandise shall apply to bonded manipulation warehouses and to other designated places of manipulation.[14]

(b) Merchandise to be manipulated under section 562, Tariff Act of 1930, as amended,[15] may be entered on Customs Form 7502 and sent directly to a storage-manipulation warehouse.

(c) Merchandise entered for warehouse may be transferred to a storage-manipulation warehouse; or merchandise entered for storage-manipulation warehouse may be transferred after manipulation to the storage portion of the same warehouse, to another storage warehouse, or to a manufacturing warehouse of class 6.

(d) The application to manipulate, which shall be filed on Customs Form 3499 with the district director having

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[14] "* * * Under such regulations as the Secretary of the Treasury shall prescribe, imported merchandise which has been entered and which has remained in continuous customs custody may be manipulated in accordance with the provisions of this section under customs supervision and at the risk and expense of the consignee, but elsewhere than in a bonded warehouse, in cases where neither the protection of the revenue nor the proper conduct of customs business requires that such manipulation be done in a bonded warehouse." (Tariff Act of 1930, sec. 562, as amended; 19 U.S.C. 1562)

[15] "* * * upon permission therefore being granted by the Treasury [Commissioner of Customs], and under customs supervision, at the expense of the proprietor, merchandise may be cleaned, sorted, repacked, or otherwise changed in condition, but not manufactured, in bonded warehouses established for that purposes and be withdrawn therefrom for exportation to a foreign country or for shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or the island of Guam, without payment of the duties, or for consumption, upon payment of the duties accuring thereon, in its condition and quantity, and at its weight, at the time of withdrawal from warehouse, with the final appraised value as may be necessary by reason of change in conditions. * * *" (Tariff Act of 1930, sec. 562, as amended; 19 U.S.C. 1562)

jurisdiction of the warehouse or other designated place of manipulation, shall describe the contemplated manipulation in sufficient detail to enable the district director to determine whether the imported merchandise is to be cleaned, sorted, repacked, or otherwise changed in condition, but not manufactured, within the meaning of section 562. Tariff Act of 1930, as amended. If the district director is satisfied that the merchandise is to be so manipulated, he may issue a permit on Customs Form 3499, making any necessary modification in such form. The district director may approve a blanket application to manipulate on Customs Form 3499, for a period of up to one year, for a continuous or a repetitive manipulation. The warehouse proprietor must maintain a running record of manipulations performed under a blanket application, indicating the quantities before and after each manipulation. The record must show what took place at each manipulation describing marks and numbers of packages, location within the facility, quantities, and description of goods before and after manipulation. The district director is authorized to revoke a blanket approval to manipulate and require the proprietor to file individual applications if necessary to protect the revenue, administer any law or regulation, or both. Manipulation resulting in a change in condition of the merchandise, which will make it subject to a lower rate of duty or free of duty upon withdrawal for consumption, is not precluded by the provisions of such section 562.

(e) No merchandise shall be manipulated elsewhere than in a bonded warehouse unless the merchandise has been regularly entered for consumption or warehouse and is of a class entitled to the warehousing privilege under section 557. Tariff Act of 1930, as amended.

(f) Upon compliance with the provisions of paragraph (d) of this section, manipulated merchandise may be further manipulated before withdrawal in cases where the



district director is satisfied that this will not endanger the revenue or interfere with the efficient conduct of Customs business. The merchandise remaining in the warehouse shall be properly repacked after each manipulation.

(g) Manipulated merchandise may be withdrawn under any form of withdrawal, but no withdrawal shall be accepted for less than an entire repacked package. Each type of withdrawal filed shall contain a summary statement indicating the quantity in the warehouse account after manipulation and immediately before the withdrawal, the quantity withdrawn on the particular withdrawal, and the quantity remaining in the warehouse after the withdrawal. When merchandise covered by a consumption entry is manipulated elsewhere than in a bonded warehouse and thereafter withdrawn for consumption, the withdrawal shall be on Customs Form 7505 and shall be liquidated in accordance with § 159.9 of this chapter.

(Secs. 556, 562, 46 Stat. 743, 745, as amended; 19 U.S.C. 1556, 1562)

[28 FR 14763, Dec. 31, 1963, as amended by T.D. 82-204, 47 FR 49371, Nov. 1, 1982

ACCOUNTS

**§ 19.12 Warehouse recordkeeping, storage and security requirements.**

(a) *Recordkeeping.* The warehouse proprietor shall comply with the following recordkeeping requirements:

(1) *Record transactions.* All merchandise entered, manipulated, manufactured or removed from the bonded warehouse shall be recorded in the warehouse proprietor's accounting and inventory records by bond lot number. The records to be maintained are those which a prudent

businessman in the same type of business can be expected to maintain. The records are to be kept in sufficient detail to permit effective and efficient determination by Customs of the proprietor's compliance with these regulations and the correctness of his annual submission;

(2) *Maintain permit file folders.* Permit file folders shall be maintained and kept up to date by filing all receipts, damage or shortage reports, manipulation requests, specific removals and blanket removals and the partial release/permit copy for each removal within two business days after the event occurs;

(3) *Extraordinary shortage or damage.* Extraordinary (one percent or more of the value of merchandise in an entry) shortage or damage shall be immediately brought to the attention of the district director; and confirmed in writing within 2 business days after the shortage or damage has been brought to the attention of the district director;

(4) *Review of permit file folder.* When the final withdrawal of merchandise relating to a specific warehouse entry, general order or seizure occurs, the warehouse proprietor shall (i) review the permit file folder to insure that all necessary documentation is in the file folder accounting for the merchandise covered by the entry and (ii) file the permit file folder with Customs within 10 business days after final withdrawal.

(5) *Warehouse proprietor submission.* Except as provided in § 19.19(b), relating to the manufacturer engaged in smelting or refining, or both, the warehouse proprietor shall file with the Regional Director, Regulatory Audit, within 45 days from the end of his business year, a Warehouse Proprietor's Submission in the form prescribed by T.D. 82-204.

(6) *Merchandise not withdrawn.* The permit file folder for merchandise not withdrawn during the general order



period shall be submitted to the district director upon receipt from Customs of the Customs Form 6043.

(7) *Disclosure of information only to authorized personnel.* The warehouse proprietor or his employees shall safeguard and shall not disclose proprietary information contained in, or proprietary information contained on, documents to be included in the permit file folder to anyone other than the importer, importer's transferee, or owner of the merchandise to whom the permit file folder or documents relates or their authorized agent. Unauthorized disclosure shall be grounds for suspension or revocation under the provisions of § 19.3(e) of the proprietor's status as a bonded warehouse operator.

(b) *Security and storage.* The warehouse proprietor shall comply with the following security and storage requirements:

(1) *Supervision by warehouse proprietor.* The warehouse proprietor shall supervise all receipts, deliveries, sampling, recordkeeping, repacking, or manipulating of merchandise in a bonded warehouse;

(2) *Inspection and security of permit file folders.* The permit file folders maintained by the warehouse proprietor shall be kept in a secure area and shall be made available for inspection by Customs at all reasonable hours;

(3) *Security of warehouse.* The warehouse proprietor shall maintain its warehouse facility and establish procedures adequate to insure the security of merchandise located in the bonded area. This shall be accomplished by meeting the standards and recommended specifications contained in T.D. 72-56 to the extent those standards and recommendations do not conflict with any local, state or Federal standard for the safe and sanitary storage of merchandise. In the event of a conflict the local, state, or Federal standard, shall control;

(4) *Bonded tanks.* All inlets and outlets to bonded tanks shall be secured with locks or in-bond seals.

(5) *Safe and sanitary storage.* Merchandise in the bonded area shall be stored in a safe and sanitary manner to minimize damage to the merchandise, avoid hazards to persons, and meet local, state, and Federal requirements applicable to specific kinds of goods. All trash and waste shall be promptly removed from the bonded area. No fires shall be permitted in the warehouse except where necessary in connection with manipulating or processing in warehouses of the class 6, 7, or 8 type. Aisles shall be established and maintained, and doors and entrances left unblocked for access by Customs officers and warehouse proprietor personnel.

(6) *Manner of storage.* Packages shall be received in the warehouse according to their marks and numbers. Packages containing weighable or gaugable merchandise not bearing shipping marks and numbers shall be received under the weighers or gaugers numbers. Packages with exceptions due to damage or loss of contents, or not identical as to quantity or quality of contents shall be stored separately. The warehouse proprietor shall mark all shipments for identification, showing the general order or warehouse entry number or seizure number and the date of the general order, entry, or delivery ticket in the case of seizures. All containers covered by a given warehouse entry, general order or seizure shall be stored in the same location and not mixed with goods covered by any other entry, general order or seizure unless approval has been given in writing by the district director for an exception from this requirement. The proprietor must provide, upon request by a Customs officer, a record balance of goods covered by any warehouse entry, general order or seizure so a physical count can be made to verify the accuracy of the record balance.

[T.D. 82-204, 47 FR 49372, Nov. 1, 1982]

## APPENDIX M

### Supplement to Statement Under Rule 28.1

SUPPLEMENT TO STATEMENT UNDER RULE 28.1

The following companies are foreign subsidiaries or affiliates which are not wholly-owned, directly or indirectly, by either Reynolds or Reynolds Industries: Fabrica de Cigarrillos El Progreso S.A.; R.J. Reynolds (Portugal) Empresa Comercial de Tobacos Ltda.; Litografia A. Romera, S.A.; Zigaretten-Umsatz-Verguetungsstelle (Z.U.V.) GmbH; Supreme Tobacco Company N.V.; R.J. Reynolds/M.C.Tobacco Company, Limited; Schupbach AG; Japan Calpak Co., Ltd.; Corrugadora Guatemala, Sociedad Anonima; Calpak Espanola, S.A.; Compania Venezolana de Conservas C.A.; Hellenic Food Industries Societe Anonyme; Kenya Canners Limited; Kentucky Fried Chicken Espana, S.A.; Kentucky, S.A.; International Process Foods; Kentucky Fried Chicken Japan Ltd.; K.F.C. (N.Z.) Ltd.; Kentucky Fried Chicken de Venezuela C.A.; Boulevard Distillers and Importers, Inc.; Inbek Company; Madera Glass Company; Jamhill Venture Company; Ste. Pierre Smirnoff Fls. (Canada) Ltd.; Heublein (Japan) Limited; Heublein, S.A. de C.V.; Disport S.A.; J.M. da Fonseca-Exportador, Lda.; J.M. da Fonseca, International-Vinhos, Limitada; Grupo Industrial B.G., S.A.; Grupo Cuervo S.A.; Oso Negro, S.A.; Tequilera de los Altos, S.A.; Servicios Ejecutivos Corporativos, S.A. de C.V.; Embotelladora y Distribuidora, S.A.; Pierre Smirnoff, S.A. de C.V.; Promocion y Consultoria de Empresas, S.A. de C.V.; Reprocesadora Industrial, S.A.; Distribuidora Bega, S.A. de C.V.; Tequila Cuervo, S.A.; Sangrita de la Vda. de Sanchez, S.A.; Ron Castillo, S.A.; Compania Benvori de Productos Alimenticios; Drury's Amazonica, S.A.-Argo Industrial; Dreher S.A. Vinhos e Champanhas, Heublein do Brasil Comercial e Industrial Ltd.; All Brands Importers, Inc.; Ohlmeyers Communications Companies; Nabisco Brands Ltd.; Societe Anonyme Moulin de Jacobert; Puerto Luz Holdings, Inc.; Industrias Riera-Marsa, S.A.; Sodibel Antilles S.A.; W. R. Jacob PLC; Polmak-Gilda Endustrial A./S.; Yamazaki

Nabisco Co. Ltd.; Mexican Foods Ltd.; Nabisco Brands Singapore Pte Ltd.; Thye Hong Food Industrias Private Ltd.; Sociedade Brasileira Beneficiadora de Cha Ltda.; Metalurgica Metacan Ltda.; Compania Nacional de Galletao Nabisco La Favovita C.A.; Gelatinas Ecuatorianas S.A.; West Indies Yeast Company Ltd.; Industrias Nabisco Cristal, Sociedad Anonima; Grupo Gamesa S.A.; Associated Biscuits International Ltd.; English Biscuit Manufacturer Ltd.; Britannia Industries Ltd.; Ceylon Biscuits Ltd.; Kan Biscuits Company Ltd.; Minas y Petroleos del Ecuador, S.A.; Petrolera Yusani, C.A.; Central African Petroleum Refineries (Private) Ltd.; Iricon Agency Ltd.; Iranian Oil Participants Ltd.; Iranian Oil Services Holdings, Ltd.; Pars Investment Corporation; and Iranian Oil Services, Ltd.

# MOTION

(3) (3)

Nos. 85-1021 and 85-1022



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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R. J. REYNOLDS TOBACCO COMPANY,
*Appellant,*

v.

DURHAM COUNTY, NORTH CAROLINA and
FORSYTH COUNTY, NORTH CAROLINA and
ITS AFFECTED MUNICIPALITIES,
*Appellees.*

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**On Appeal from the Supreme Court of North Carolina and the North Carolina Court of Appeals**

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## MOTION TO DISMISS OR AFFIRM

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16 pp

## QUESTION PRESENTED

Whether imported tobacco stored in United States customs bonded warehouses for domestic sale and consumption is exempt from nondiscriminatory ad valorem taxation.

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**On Appeal from the Supreme Court of North Carolina and the North Carolina Court of Appeals**

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## MOTION TO DISMISS OR AFFIRM

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MAY IT PLEASE THE COURT:

Appellee, Durham County, North Carolina, moves that the appeal herein taken be dismissed on the ground that said appeal does not present a substantial federal question, or, in the alternative, to summarily affirm the judgment below.

### STATEMENT OF THE CASE

R. J. Reynolds Tobacco Company (hereinafter "Reynolds"), a New Jersey Corporation authorized to do business in North Carolina, is appealing the decision of the North Carolina Court of Appeals which held that tobacco

stored by Reynolds in customs bonded warehouses in Durham and Forsyth Counties to be used for domestic consumption is not immune from taxation. Reynolds had earlier appealed from a trial de novo in the North Carolina Property Commission to the North Carolina Court of Appeals. The issue being presented at trial being whether the tobacco stored in customs bonded warehouses in Durham and Forsyth Counties was immune from taxation under this Court's holding in *Xerox Corp.* v. *County of Harris*, 459 U.S. 145 (1982).[1]

Reynolds is engaged in the business of manufacturing finished tobacco products in Forsyth County, North Carolina. Reynolds imports tobacco from foreign countries to be stored in Forsyth and Durham Counties in customs bonded warehouses for approximately two years before it can be used in the manufacturing process. This two year period is necessary to "age" the tobacco before manufacture. During this aging process, the tobacco may be moved and turned over by Reynolds; similarly, the tobacco can be repacked if it incurs damage. After the tobacco is withdrawn from storage, it is normally manufactured into finished products in Forsyth County, North Carolina within two weeks of its withdrawal. The finished tobacco products are then transported to Reynolds wholesale and retail dealers and distributors within 30 days of manufacturing. Virtually all the tobacco products manufactured by Reynolds from imported tobacco are sold and consumed domestically in the United States. (App. D, pp. 26a, 31a-32a) The tobacco which is the subject matter of this action is not exported to purchasers

[1] The precise question presented was stated by the Property Tax Commission as follows: "Is the imported tobacco owned by Reynolds and stored in United States customs bonded warehouses located in Durham and Forsyth Counties excluded from ad valorem taxation by those counties in accordance with the decision of the Supreme Court of the United States in *Xerox Corporation* v. *County of Harris, Texas, and City of Houston, Texas,* —— U.S. ——, 103 S.Ct. 523, 74 L.Ed. 2d 323 (1982)?" (App. D, pp. 22a-23a).



in foreign countries as was indicated in the Jurisdictional Statement of the Appellant.[2]

Reynolds first claimed that the tobacco situated in Durham and Forsyth Counties was immune from taxation in accordance with this court's decision in *Xerox Corp.* v. *County of Harris, supra,* in its application to the Tax Supervisors of the two counties. The two Tax Supervisors denied the request for immunity, and the Board of Equalization and Review for the two counties likewise denied the immunity. (App. D, p. 21) As indicated above, Reynolds then appealed to the North Carolina Property Tax Commission for a trial de novo on the question of whether or not the tobacco stored in customs bonded warehouses in Durham and Forsyth Counties for domestic consumption was immune from taxation under *Xerox.* The Property Tax Commission held that the tobacco was not immune from taxation in that the tobacco was destined for domestic use instead of foreign markets as was the case in *Xerox.*

Reynolds then filed an appeal with the North Carolina Court of Appeals in which Reynolds claimed immunity from ad valorem taxation based on preemption in the *Xerox* case, and for the first time raised the questions of immunity based on the Import/Export Clause, and the Due Process Clause of the United States Constitution.[3]

[2] Reynolds in its Jurisdictional Statement states that "a portion of its finished tobacco products are exported to purchases in foreign countries." (Jur. Stat., p. 6) This is clearly in error as both the N. C. Property Tax Commission and the North Carolina Court of Appeals found that the tobacco products were consumed in the United States. (App. C, p. 7a, App. D, p. 31a) It should also be noted that Reynolds did initially take exceptions to some of the findings of fact of the Property Tax Commission, but did not pursue these on appeal. The North Carolina Court of Appeals confined its review to the constitutional arguments of Reynolds (App. C, p. 8a)

[3] While these issues were raised on appeal for the first time, the North Carolina Court of Appeals addressed all of these issues in its decision.

A three member panel of the Court of Appeals unanimously affirmed the decision of the Property Tax Commission.

Reynolds then appealed to the North Carolina Supreme Court, and Reynolds also filed a Petition For Discretionary Review with the North Carolina Supreme Court. The appeal was dismissed for lack of a substantial constitutional question and the Petition For Discretionary Review was concurrently denied.

## THE QUESTIONS PRESENTED ARE INSUBSTANTIAL

### I. The Nondiscriminatory Ad Valorsm Taxation by Durham and Forsyth Counties Is not Preempted Under the Commerce Clause as Stated in *Xerox Corp.* v. *County of Harris, Infra,* in That the Tobacco Is Destined for Domestic Consumption.

In *Xerox Corp.* v. *County of Harris*, 459 U.S. 145 (1982), this Court stated the issue before it as follows:

> We noted probable jurisdiction to decide whether a state may impose nondiscriminaotry ad valorem personal property taxes on imported goods stored under bond in a customs warehouse and destined for foreign markets.[4]

This Court did not attempt to decide the situation in the current case in *Xerox*. In the *Xerox* case, the goods were stored in customs bonded warehouses for sale in Latin America. The printing on the machines and the company's instructions were in Spanish and Portuguese.[5] Additionally, most of the machines did not operate on electric current which is standard in the United States and many of them were not safety approved for use in this country. In the current case, the tobacco being stored by Reynolds is not for export to a foreign country.

[4] *Xerox* at 146.

[5] *Id.* at 147.



This tobacco is being held for processing in North Carolina and for domestic consumption in the United States.[6] This case is therefore not controlled by *Xerox*. It should also be noted that this Court stated in its decision in *Xerox* that Xerox had paid ad valorem taxes to the County of Harris, Texas and City of Houston, Texas on copiers which were being held in Texas for domestic use.[7] Taxes on the copiers stored in the Houston warehouse for domestic consumption were therefore not an issue before this Court in the *Xerox* case.

This Court was presented with a factual situation very similar to the present case in *American Smelting and Refining Company* v. *County of Contra Costa*, 271 Cal. App.2d 437, 77 Cal. Rptr. 570 (1969), appeal dismissed, 396 U.S. 273, rehearing denied, 397 U.S. 958 (1970). The *American Smelting* case involved metals which were brought into California for processing in customs bonded warehouses for both domestic consumption and foreign consumption. The California court stated:

> Imported goods in bonded warehouse which are subject to withdrawal only for export or for use as ship's stores are exempt from taxation of any state or subdivision thereof.[8]

This holding is in accord with this Court's holding in *Xerox* and this Court's previous holding in *McGoldrick* v. *Gulf Oil Co.*, 309 U.S. 414 (1940). The Court in *American Smelting* commented on this Court's decision in *McGoldrick* and stated:

> In *Gulf Oil* the combination of laws and regulations demonstrated and executed the congressional policy to relieve the importer of the import tax so that he

[6] App. C, p. 7a; App. D, p. 31a.

[7] *Xerox* at 148, n. 5.

[8] *American Smelting*, 77 Cal. Rptr. at 598.

might meet foreign competition in the sale of fuel as ships' stores. So here it may be assumed that Congress in providing for the discharge of the obligation to pay the duty when the refined metal is exported . . . has intended that the importer should be able to compete with foreign smelters in international trade without being subjected to an import tax. The implemenutation of this policy is satisfied by the exemption of that portion of the metal-bearing material that is earmarked to be refined for export purposes.[9]

In the case at bar, there is no policy present as there was in *McGoldrick* to aid with competition in foreign markets as the tobacco is being held for domestic manufacturing and competition.

The question then decided by *American Smelting* and presented in this case is whether taxation by the states and their political subdivisions is preempted by the Tariff Act of 1930. The precise formulation of the preemption question as stated by this Court in *Xerox* is:

> Whether it would be compatible with the comprehensive scheme Congress enacted to effect these goals if the States were free to tax such goods while they were lodged temporarily in Government-regulated bonded storage in this country.[10]

In order to determine whether the "comprehensive scheme" is compatible, it is necessary to look to the legislative intent of the Congress in its enaction of the act creating a customs bonded warehousing system. This Court has stated this rationale as follows:

> The act stimulated foreign commerce by allowing goods in transit in foreign commerce to remain in secured storage, duty free, until they resume their journey in export . . . its objective was to stimulate

[9] *Id.* at 596.

[10] *Xerox* at 151.



> business for American industry and work for Americans.[11]

The purpose as stated by this Court is not interfered with by the taxing of Durham and Forsyth Counties of the tobacco stored in warehouses in Durham County and in Forsyth County. These goods are no longer in foreign commerce, nor or they to resume a journey in export. The taxing by the Counties of Durham and Forsyth actually promote the comprehensive scheme of Congress. To fail to tax these goods would result in a bounty to Reynolds. Reynolds would receive the same local governments services such as police and fire protection, as do warehouses holding domestic tobacco. This would in fact discourage the use of American tobacco by Reynolds and other manufacturers in favor of the tax free foreign tobacco. This would result in jobs being lost by farmers in the United States with the same farmers being forced to subsidize their foreign competition through the taxes being paid to the local governments. This clearly does not stimulate American industry and work for Americans. This has been recognized by the Court in *American Smelting* which stated:

> . . . scrutiny does not reveal that Congress intended to relieve metal-bearing materials, not destined for foreign consumption of nondiscriminatory taxation. If such were the intent, and if it were carried out, it would amount to a bounty to the operator of the tide land smelter processing metal-bearing materials of foreign origin which are destined for domestic consumption, and a discrimination against operators of domestic smelters refining domestic ores which are subject to local taxation.
>
> For these reasons, and for those set forth above in connection with the analysis of the statute and regulations, it is concluded that the laws and regulations relating specifically to bonded smelting and refining

[11] *Id.* at 150-151.

warehouses do not fall within the orbit of the *Gulf Oil* case, and confer an immunity from a nondiscriminatory tax on property of foreign origin being processed for domestic consumption.[12]

This nondiscriminatory ad valorem taxation does not interfere with the comprehensive scheme adopted by Congress and the taxes therefore are not preempted.[13]

**II. The Question Raised by the Appeal Has Been Previously Determined by the Supreme Court.**

The case of *American Smelting and Refining Co.* v. *County of Contra Costa, supra,* decided precisely the question currently before this Court in that it addressed the issue of goods held in customs bonded warehouses for domestic consumption. The Court there held that these goods were not immune from taxation by the counties which imposed a nondiscriminatory ad valorem tax. This case was appealed to this Court and was dismissed for want of a substantial federal question. This is a decision on the merits for the questions actually presented in the appeal. The Court has no discretion on whether or not to pass on the merits as to the case when it comes up on appeal. *Hicks v. Miranda,* 422 U.S. 332, 344 (1975). As stated above, the issue of taxability of goods stored in customs bonded warehouses for export was considered in *American Smelting,* and those goods held for export were held to be immune from taxation and the

[12] *American Smelting,* 77 Cal. Rptr. at 596-597.

[13] Reynolds in its Jurisdictional Statement questions whether *American Smelting and Refining Company* v. *County of Contra Costa, supra,* has continuing validity after *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434 (1979). (Jur. Stat., p. 4 n. 3) *Japan Line* did not even consider the questions presented here. That case involved a question of double taxation between Japan and a County in California. Here the question is not of double taxation, but of Reynolds not having to pay taxes at all. Additionally, customs bonded warehouses were not involved in Japan Line, but the question was one of apportionment of taxes.



goods not held for export were not immune from taxation. The issue presented in this appeal is precisely the same as the issue in *American Smelting* as the goods are being held for domestic consumption. The dismissal of *American Smelting* by this Court is ruling by this Court on this same issue. This question has been previously decided by this Court and the Appellants have not shown any reason for a reconsideration at this date. That decision holding goods stored for domestic consumption to be subject to ad valorem taxation is controlling in this case as a ruling by this Court.

**III. The Imposition of Nondiscriminatory Ad Valorem Taxes by the Counties of Durham and Forsyth Is not Prohibited by the Import/Export Clause of the Constitution.**

The question of nondiscriminatory ad valorem taxation of the imports has been answered by this Court in *Limbach* v. *Hooven & Allison,* No. 83-96, —— U.S. —— (April 18, 1984). This Court has stated its position as follows:

> To repeat: we think it clear that this Court in *Michelin* specifically abandoned the concept that the Import/Export Clause constituted a broad prohibition against all forms of state taxation that fell on imports. *Michelin* changed the focus of Import/Export Clause cases from the nature of the goods as imports to the nature of tax at issue. The new focus is not on whether the goods have lost their status as imports but it, instead, on whether the tax sought to be imposed is an "Impost or Duty." [14]

This Court has thus clearly stated that it is not proper to look at the goods as to whether they are in the importation process or are stored in customs bonded warehouses, but rather to look to the tax to see if it is a nondiscriminatory property taxes or instead an Impost

[14] *Limbach,* 52 L. W. at 4481.

or Duty. It is undisputed in this case that the taxes imposed by the Counties of Forsyth and Durham are nondiscriminatory ad valorem taxes. The taxation does not therefore violate the Import/Export Clause of the Constitution.

### IV. The Imposition of Ad Valorem Taxes on Goods Held in Customs Bonded Warehouses Does Not Violate the Due Process Clause of the Constitution.

This Court has stated that the test of whether a tax law violates the Due Process Clause in *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435 (1940) as follows:

> whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.[15]

It is clear from this test that a due process argument is clearly inapplicable in the present case. The tobacco stored by Reynolds in Durham and Forsyth Counties receives the same police and fire protection as all other property located in these counties. This is not a case whether the property is physically outside the jurisdiction. The tobacco receives the benefits for which it is paying taxes to the counties of Forsyth and Durham. The property tax is thus valid under the Due Process Clause of the Constitution.

## CONCLUSION

The question presented by this appeal has previously been answered by this Court in its dismissal of *American Smelting, supra.* There is no reason to reopen the discussion of this issue as Congressional policy is not offended by the taxing of the counties of Forsyth and Durham of goods stored in custom bonded warehouses

[15] *Wisconsin* at 444.



solely for domestic consumption. The power of the States to tax is therefore not preempted by the Congressional Act, and the questions of the Due Process and Import/Export Clauses have been answered by this Court.[16] The Motion of Appellee, Durham County, North Carolina, to dismiss the appeal or to summarily affirm should be sustained.

Respectfully submitted,

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January, 1986

[16] This motion has not attempted to address Reynold's statements in its Jurisdictional Statement concerning the Foreign Trade Zone Act, 19 U.S.C. § 81 (1982). This is because this Act has nothing whatsoever to do with this case before the Court. This case does not involve any property stored in a Foreign Trade Zone. Further, Reynolds makes no claim that Congress has directly prohibited taxation of goods in customs bonded warehouses as they have in foreign trade zones.

# MOTION

Nos. 85-1021, 85-1022

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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R.J. REYNOLDS TOBACCO COMPANY,
*Appellant,*

v.

DURHAM COUNTY, NORTH CAROLINA and
FORSYTH COUNTY, NORTH CAROLINA
and ITS AFFECTED MUNICIPALITIES,
*Appellees.*

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**On Appeal from the Supreme Court of North Carolina and Court of Appeals of North Carolina**

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## MOTION TO DISMISS OR AFFIRM

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## QUESTION PRESENTED

Whether imported tobacco, stored in United States customs bonded warehouses in Forsyth County for aging prior to being used in Forsyth County for the manufacture of finished tobacco products for domestic sale and consumption, is exempt from nondiscriminatory ad valorem taxation.

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---

**On Appeal from the Supreme Court of North Carolina and Court of Appeals of North Carolina**

---

## MOTION TO DISMISS OR AFFIRM

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Forsyth County, North Carolina and its affected municipalities (Winston-Salem and Kernersville) respectfully move the Court pursuant to Rule 16 to dismiss the appeal herein or, in the alternative, to summarily affirm the judgments of the Supreme Court and Court of Appeals of North Carolina, on the grounds that the appeal does not present a substantial federal question, that it is manifest that the question on which the decision depends is so unsubstantial as not to need further argument, and that the decision below is obviously correct. This Motion

to Dismiss or Affirm addresses both of appellant's identical jurisdictional statements—one seeking appeal from the North Carolina Supreme Court and one from the North Carolina Court of Appeals.[1]

## PROCEEDINGS BELOW

Reynolds' (the appellant's) 1983 ad valorem tax listings for Forsyth County, North Carolina contained a claim for exemption [2] of a total of $432,448,868 in value of imported tobacco held in U.S. Customs bonded warehouses in Winston-Salem and Kernersville (App. D, p. 29a). Of this value, $247,675,428 is stored in Kernersville and $184,773,440 is stored in Winston-Salem (*Id.*). The request for exemption was denied by the Tax Supervisor. On appeal to the local Board of Equalization and Review, the request was again unanimously denied.

Reynolds filed notice of appeal with the North Carolina Property Tax Commission, which sits of record as the State Board of Equalization and Review (App. D, p. 21a). The Property Tax Commission denied exemption in a detailed opinion containing 53 undisputed findings of fact (App D, pp. 21a-37a). These findings are based on essentially uncontroverted evidence.

The Final Decision of the Property Tax Commission was appealed to the North Carolina Court of Appeals, which affirmed unanimously in a thorough opinion (App. C, pp. 5a-19a). 73 N.C. App. 475, 326 S.E. 2d 911 (1985).

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[1] On inquiry, the Office of the Clerk of this Court informed counsel of record for these appellees that one motion would be sufficient under the circumstances.

[2] This claim for exemption, filed on April 15, 1983 within the listing period, was based exclusively on *Xerox Corp. v. County of Harris, Texas*, 459 U.S. 145 (1982), decided December 13, 1982 (App. D, p. 22a; App. 1, p. 1a).



Reynolds gave notice of appeal to the North Carolina Supreme Court and also petitioned for discretionary review. The North Carolina Supreme Court allowed Forsyth County's motion to dismiss the appeal for lack of a substantial constitutional question, and denied Reynolds' petition for discretionary review (App. A, p. 1a). 314 N.C. 540, 335 S.E. 2d 21 (1985). Reynolds has appealed to the United States Supreme Court, alleging a substantial federal question.

## STATEMENT

The facts of this case are not in dispute. The unchallenged findings of the North Carolina Property Tax Commission are set forth succinctly in its Final Decision (App. D, pp. 26a-32a).

All of the subject tobacco is imported from various foreign countries, including Bulgaria, Syria, Brazil, Lebanon and Turkey (App. D, p. 29a). Virtually all of the subject imported tobacco is used domestically in Winston-Salem, North Carolina, in Reynolds' manufacturing operations (App. D, p. 31a). None of the subject property in customs bonded storage was being held for export (App. D, p. 32a). This tobacco has been coming to Forsyth County for manufacturing purposes for "at least twenty-five" years (App. 1, pp. 1a, 3a). In the manufacturing process, the subject imported tobacco is blended with domestic tobacco and made into finished tobacco products in Forsyth County (App. D, p. 31a). Virtually all of the finished products are sold and consumed in the United States (App. D, p. 31a).

Until the imported tobacco is required for manufacturing needs, the subject property is stored and aged by Reynolds in its privately owned customs bonded warehouses in Winston-Salem and Kernersville, North Carolina (App. D, p. 31a). Domestic tobacco is likewise stored and aged, but in non-customs warehouses (App. D, p. 32a). Federal customs law allows Reynolds to postpone

payment of the federal import duty until the property is removed from the warehouses by Reynolds for manufacturing (i.e., domestic use) in Winston-Salem (App. D, p. 32a). 19 U.S.C. 1555 *et seq.* The reason Reynolds stores imported tobacco in customs bonded warehouses is to defer payment of federal import duties (App. D, p. 32a). Upon removal for manufacturing, Reynolds must pay and pays the federal government the customs duties owed (App. D, p. 32a).[3]

While some of the imported tobacco is aged when it arrives in the United States, ordinarily it requires aging before it can be used in manufacturing. This imported tobacco is normally held in storage in Reynolds' customs bonded warehouses for two years before it is used in the manufacturing process (App. D, p. 31a). For purposes of aging and storage, the imported tobacco could be held equally well in a non-customs warehouse (App. 1, p. 2a). It may be removed from customs bond whenever Reynolds chooses to pay the import duty (App. D, p. 32a). Within two weeks at most after withdrawal from customs bond, the subject imported tobacco is blended with domestic tobacco and manufactured into a finished product (App. D, p. 31a). Within thirty days after manufacture, at most, the finished tobacco products themselves are shipped from Forsyth County to Reynolds' dealers and distributors (App. D, p. 31a).

Reynolds owns all of the sixty-two (62) customs-bonded warehouses which are located on its general premises in Forsyth County along with its other buildings and facilities (App. D, p. 30a). They are private warehouses and

[3] As of January 1, 1983, customs duties paid or to be paid by Reynolds on the subject imported tobacco totalled 35-40 million dollars in Forsyth County and 7-8 million dollars in Durham County (App. D, p. 32a). For the year 1983, 10 million dollars in customs duties had been paid through September, and 3 million dollars more would be paid through December on the Forsyth tobacco alone (App. 1, p. 2a).



Reynolds is the sole user (*Id.*). Some are Class 8 storage sheds in which Reynolds may manipulate (turn, repackage, etc.) the imported tobacco (App. D, p. 30a). The others are Class 2 "areas"— not separate buildings— located in its manufacturing plants to which the tobacco is moved shortly before manufacture (App. D, p. 30a, in particular finding (27)). Reynolds pays all expenses, including insurance, of maintaining and securing said customs bonded warehouses and the subject tobacco (App. D, p. 30a). No federal customs officials are assigned to be or are physically present at these warehouses (App. D, pp. 30a, 31a). "Customs bond" simply means that Reynolds has paid a private surety or sureties to guarantee payment to the federal government of import duties on the subject imported tobacco (App. C, p. 6a). The customs bonded warehouses and subject imported tobacco benefit from and receive the same police, fire and all other services provided by the County and its affected municipalities to all other citizens and property of Forsyth County (App. D, p. 32a). The property tax at issue is nondiscriminatory; the applicable tax rates for imported tobacco and other tobacco are the same (App. D, p. 32a).[4] Domestic tobacco stored by Reynolds in non-bonded warehouses in Durham and Forsyth Counties is taxed (App. D, p. 32a).

[4] The 1983 property taxes assessed on the subject property in Forsyth County of 6 million dollars were subsequently reduced by forty percent (40%) to 3.6 million dollars to reflect the sixty percent (60%) preferential tax treatment granted by state law, upon application of the taxpayer, for agricultural products in storage for manufacturing purposes (App. 2, p. 4a; N.C. Gen. Stat. 105-277(a)).

## ARGUMENT

The question presented is not substantial.

### I. CONGRESS HAS NOT PREEMPTED STATE AND LOCAL GOVERNMENTS FROM PROVIDING FOR THE NONDISCRIMINATORY AD VALOREM TAX CHALLENGED BY APPELLANT.

This case was thoroughly briefed before the North Carolina Property Tax Commission and North Carolina Court of Appeals, and their opinions squarely address appellant's contentions (App. D, pp. 21a-37a; App. C, pp. 5a-19a).

Pursuant to authority conferred in Article I, § 8, cl. 3 of the Constitution of the United States, the Congress has enacted the Tariff Act of 1930, as amended, 19 U.S.C. § 1001 *et seq.* That Act provides for imposition of federal customs duties on goods imported into this country. This includes authorization for bonded warehouses for the storage of imports duty-free for up to five years pending the export or domestic use of these goods. 19 U.S.C. §§ 1551 to 1565; 19 C.F.R. § 19.1 *et seq.* If exported during this period of time, no duty is imposed on these goods. 19 U.S.C. § 1557(a) (App. L, p. 62a). It is undisputed that the imported tobacco at issue in this appeal is stored for domestic use (App. D, pp. 31a, 32a). All customs duties are paid on this tobacco as none of it is held for export (App. D, p. 32a).

In *Xerox Corp. v. County of Harris, Tex.*, 459 U.S. 145 (1982), the Supreme Court in its threshold statement said:

> "We noted probable jurisdiction to decide whether a state may impose nondiscriminatory ad valorem personal property taxes on imported goods stored under bond in a customs warehouse and *destined for foreign markets.*" 459 U.S. at 146 (emphasis added).



The issue decided was based upon a dramatic factual distinction from the case *sub judice*. In particular, the Xerox Corporation stored imported copiers which had been previously assembled in Mexico in customs bonded public warehouses in Harris County, Texas. The copiers were not designed or intended for domestic use, containing instructions in Spanish or Portuguese. All of the copiers were eventually exported and sold abroad and, therefore, Xerox never paid import duties on these goods. 459 U.S. at 147, 148.

In determining whether the local governmental authorities could impose property taxes on these copiers while temporarily stored in Texas pending export, the Court examined the legislative history and congressional purpose behind the establishment of the bonded warehousing system. Noting that the purposes behind the predecessor legislation to the Tariff Act of 1930 were grounded on encouraging the use of this country as a center for international commerce, with its concomitant benefits for the American economy, the Court stated:

> "The Act stimulated foreign commerce by allowing goods *in transit* in foreign commerce to remain in secure storage, duty free, *until they resumed their journey in export.* The geographic location of the country made it a convenient place for *transshipment* of goods within the Western Hemisphere and across both the Atlantic and the Pacific." 459 U.S. at 150, 151 (emphasis added).

Consistent with these objectives, and on the facts presented there, the Court ruled that imposition of property taxes on the Xerox copiers destined for export was preempted under the Supremacy Clause of the Constitution (Article VI, Clause 2) by the actions of Congress in regulating customs duties. 459 U.S. at 154.

In reaching this conclusion, the Court relied upon case law determining that the City of New York could not impose a sales tax on imported petroleum sold for use as

fuel on foreign-bound vessels engaged in foreign commerce, *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940); and that the District of Columbia could not impose excise taxes on the sale of imported alcoholic beverages to foreign embassies and other foreign nationals for their personal use, since "[r]eciprocity or comity in allowing diplomatic personnel to import goods duty-free and tax free for their own use has long been traditional in international law and relations and has been recognized by Congress." *District of Columbia v. International Distributing Corp.*, 331 F. 2d 817, 820 (D.C. Cir. 1964). *Xerox Corp.*, 459 U.S. at 151-154. In marked contrast to these cases, however, the present appeal concerns the permissibility of local taxation of imported goods which clearly are present solely for private domestic use.[5] The subject tobacco came to Forsyth County for use there, not to be transhipped; it has arrived at its home and ultimate destination (App. D, p. 31a). It is not "in transit" and will not resume any journey (App. 1, pp. 1a, 3a).[6]

Discussing preemption, the North Carolina Court of Appeals said in its opinion (App. C, p. 13a):

> "In *Silkwood* v. *Kerr-McGee Corp.*, —— U.S. ——, *rehearing denied*, —— U.S. —— (1984), the U.S.

[5] The court in *American Smelting, infra*, 77 Cal. Rptr. at 598-601, carefully reviewed *McGoldrick* and numerous cases construing *McGoldrick*, and found that in each instance the materials held exempt from taxation were held for export and not for domestic use.

[6] Unquestionably, the subject property and similarly imported tobacco is and has been for years committed to domestic manufacturing into finished tobacco products at Reynolds' plants in Forsyth County; and Reynolds has applied for and received state preferential tax treatment for tobacco held in Forsyth County for manufacturing. *See, In re Appeal of Forsyth County*, 285 N.C. 64, 203 S.E. 2d 51 (1974); N.C. Gen. Stat. 105-277(a) (App. 2, p. 4a; App. 1, pp. 1a, 3a). In every sense, this imported tobacco is committed to the supply of Reynolds' domestic business needs (App. D, p. 31a).



> Supreme Court explained that state law can be preempted in two ways. First, if Congress evidences an intent to occupy a field, any state law falling within that field is preempted. Secondly, if Congress has not entirely displaced state regulation over the matter, state law is still preempted to the extent it *actually* conflicts with federal law or hinders the accomplishment of the objectives of Congress. *Id.* at ——." (emphasis added).

*Accord, Automated Medical Laboratories, infra.* But, consistent with principles of federalism, the Court has cautioned:

> "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

*See also, Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, (1947).

More recently in *Hillsborough County, Fla. v. Automated Medical Laboratories*, —— U.S —— (No. 83-1925, 1985), the Court unanimously held that county ordinances regulating blood donors and blood centers are not preempted by federal standards for the collection of blood plasma, noting that the "regulation of health and safety matters is primarily, and historically, a matter of local concern." —— U.S. at ——. Similarly, assessment of the nondiscriminatory property tax in issue to provide for shared governmental services is a time-honored fundamental right of local governments, without which their very existence is jeopardized. *See, e.g., Parker v. Brown*, 317 U.S. 341, 351 (1943) ("In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unex-

pressed purpose to nullify a state's control . . . is not lightly to be attributed to Congress.").

The Court in *Automated Medical Laboratories* also pointed out that it is "even more reluctant to infer preemption from the comprehensiveness of regulations [as argued here, App. L, pp. 73a-100a] than from the comprehensiveness of statutes." —— U.S. —— (brackets inserted). *See also, Metropolitan Life Insurance Company v. Massachusetts*, —— U.S. —— (Nos. 84-325, 84-356, 1985).

Appellant has cited no provision of the Tariff Act of 1930 which manifests an express congressional intention to preempt states from authorizing the imposition of local property taxes on imported goods held in customs bonded warehouses for domestic use and indeed, there is none. Appellant cannot cite any facts of record showing a conflict between taxation here and customs bond regulation. Nor is it appropriate to infer preemption from the nature of the federal and state statutory schemes involved in this appeal. Under these circumstances, for this Court to strike down the property taxes at issue on the basis of unaffected customs laws "would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960) (holding that a local smoke abatement ordinance was not preempted by federal statutes relating to inspection and control of steam vessels).

The Machinery Act, N.C. Gen. Stat. 105-271 *et seq.*, establishes a detailed program for the listing, appraisal, assessment and collection of taxes on real and personal property in North Carolina (App. C, p. 17a). However, the Act neither imposes customs duties on imported goods nor otherwise purports to regulate customs bonded warehouses.



Discussing the fundamental distinction between customs duties and local property taxes, the Supreme Court of the United States has recently explained:

> "Unlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country, such property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth; there is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods.
>
> * * * *
>
> "[N]ondiscriminatory ad valorem property taxes do not interfere with the free flow of imported goods among the States . . ." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 287 (1976).

Nor is imposition of ad valorem taxes in issue inconsistent with the objectives of the Tariff Act of 1930 and its predecessor legislation. As previously noted, the central purpose in establishing customs bonded warehouses was to benefit the American economy by encouraging the use of this country as a center for the *transshipment* of goods throughout the world. *Xerox*, 459 U.S. at 151. To achieve this result, Congress permitted goods to be temporarily stored duty-free and, if exported, waived customs duties altogether. *Xerox*, 459 U.S. at 151. While imposition of ad valorem taxes on imported goods temporarily stored in customs bonded warehouses prior to export out of the country could impair this purpose by making the United States a less attractive storage center for goods destined for reshipment to foreign markets,[7] it is appar-

[7] *See, e.g.*, N.C. Gen. Stat. 105-275(1) which contains an exemption from ad valorem taxation for tobacco and other products held or stored for shipment to a foreign country, to encourage the development of the ports of North Carolina [statute paraphrased]. In comparison, while tobacco stored for domestic manufacturing or processing is entitled to taxation at a reduced rate in specified cir-

ent that taxation of goods present in the United States solely for *domestic* use does not affect this congressional objective.

This Court expressed concern in *Xerox* that a state tax "might equal or exceed the remitted import duty" for products which would "not be sold in domestic commerce." 459 U.S. 152, 153. No such concern exists here. Import duties are not remitted but rather are paid in full (App. D, p. 32a), and the products will be sold in domestic commerce (App. D, p. 31a). Reynolds' warehouses and manufacturing facilities are not transshipment centers. As the North Carolina Court of Appeals stated:

> "Thus, we are faced with a different question than the U.S. Supreme Court faced in *Xerox*. While the imposition of ad valorem taxes on imported goods stored temporarily in this country prior to reexportation would make the United States a less attractive storage center and in turn contravene congressional objectives, we fail to see how the imposition of property taxes on goods not intended to be reexported would be inconsistent with the central purposes behind the establishment of customs bonded warehouses." (App. C, p. 14a).

*American Smelting and Refining Company v. County of Contra Costa*, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570 (1969), dismissed for want of a substantial federal question (*per curiam*), 396 U.S. 273 (1970), taxpayer's pet. for reh'g den., 397 U.S. 958 (1970), is the only decision which has directly addressed the preemption issue in the factual context presented by this appeal—namely, taxation of imported goods stored in customs bonded warehouses for *domestic* use. In that case, a California county levied property taxes on imported ore in customs bonded warehouses, some of which was held for domestic use and some of which was held for transshipment (re-export). Like appellant herein, the taxpayer contended, *inter alia*,

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cumstances, N.C. Gen. Stat. 105-277(a), there is no provision for complete exemption from taxation for such tobacco (App. 2, p. 4a).



that Congress had preempted state or local governments from imposing property taxes on the imported goods while under customs bond. While holding (consistent with *Xerox*) that imported goods held in bonded warehouses and awaiting export could not be taxed by state and local government (77 Cal. Rptr. at 596), the Court sustained the validity of the property taxes on such goods held for *domestic* use. The Court stated:

> "The mere incident of the time of payment of the federal duty as controlled by the taxpayer, does not appear to be a rational criteria upon which to predicate the determination of the local government's right to tax. The security interest of the federal government should not affect the local government's right to tax . . .
>
> * * * *
>
> "The law and regulations governing bonded smelting and refining warehouses do not compel the conclusion that Congress in the exercise of its power to regulate *foreign* commerce has attempted to create a warehouse enclave of foreign commerce to provide a means whereby goods may be processed locally and . . . subsequently sold and consumed in *domestic* commerce. All that appears is an intent to relieve the processor of the obligation to pay the duty until the refined product is actually consumed or sold in domestic commerce, and the intent to relieve him of the obligation to pay any duty if the refined product is exported." *Id.* at 593-594 (emphasis added).

The Court further held:

> "It is concluded that neither the laws, nor the regulations, nor the precedents on which the taxpayer relies show a congressional intent to interfere with the right of the state to tax goods which have been imported for, and have been appropriated to, processing for *domestic* consumption, and that such right is not foreclosed because the importer-processor has withheld payment of the duty and has given a bond to secure such payment . . ." *Id.* at 601 (emphasis added).

In reaching this conclusion, the Court in a thorough, carefully-reasoned opinion explained that the congressional purpose of assisting importers in competing with foreign companies in international trade was satisfied by excluding from local property taxation "that portion of the metal-bearing material that is earmarked . . . for export purposes." *Id.* at 596. This reasoning is equally applicable to the instant case and is completely consistent with *Xerox.*

Dismissal of the appeal from the state court in *American Smelting* by the United States Supreme Court for want of a substantial federal question constituted a decision "on the merits". *Hicks v. Miranda,* 422 U.S. 332, 344 (1975). This conclusion is buttressed by the denial by the Supreme Court of the taxpayer's petition for rehearing of the dismissal in *American Smelting.* 397 U.S. 958.

Both imported and domestic leaf tobacco generally require aging, typically for a period of two years, before being manufactured into finished products (App. D, p. 31a; App. 1, p. 2a). To exclude the imported tobacco held in customs bonded warehouses from ad valorem taxation altogether during the aging and storage period, while such taxes are being collected for domestic tobacco undergoing equivalent storage and aging in Reynolds' non-customs warehouses, would create a substantial and unjustified competitive advantage favoring the use of foreign tobacco in the manufacturing process. Indeed, as the *American Smelting* court observed, in rejecting the identical argument which appellant has raised in this appeal:

> "it would amount to a bounty to the operator of the tideland smelter processing metal-bearing materials of foreign origin which are destined for domestic consumption, and a discrimination against operators of domestic smelters refining domestic ores which are subject to local taxation." *American Smelting and Refining Company, supra,* 77 Cal. Rptr. at 596-597.



A second anomalous and unjust result of accepting appellant's position is that it would force local taxpayers in Durham and Forsyth Counties to, in effect, provide an annual subsidy amounting to millions of dollars to the R. J. Reynolds Tobacco Company. The imported tobacco stored in these counties for domestic use receives the same local governmental services, including garbage collection and police and fire protection, as all other property (App. D, p. 32a), and should be required to bear its fair share of the costs of providing those services. As the Supreme Court of the United States has observed, local property

> "taxation is the *quid pro quo* for benefits actually conferred by the taxing State. There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods." *Michelin Tire Corp., supra,* 423 U.S. at 289.

*Accord, American Smelting and Refining Company, supra,* 77 Cal. Rptr. at 587.

In summary, there has been no express preemption by Congress in exercising its authority under Article I, § 8, cl. 3 of the Constitution of the United States, and such is not required to meet the objectives underlying the establishment of customs bonded warehouses. Taxation here does not interfere in any manner. Moreover, finding an implied preemption in this case would create an inequitable and unwarranted burden on domestic tobacco and the taxpayers of Durham and Forsyth Counties, contrary to *Michelin.* No case has preempted property under these circumstances and appellant, therefore, has cited none; rather, *American Smelting* has expressly found it taxable. *Xerox* and *American Smelting* are consistent.[8]

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[8] For the first time in its Jurisdictional Statements at pp. 11-15, based on material nowhere in the record, appellant contends that the 1984 amendment to the Foreign Trade Zones Act somehow

## II. THE IMPORT-EXPORT CLAUSE DOES NOT BAR IMPOSITION OF NONDISCRIMINATORY AD VALOREM TAXES.[9]

The Import-Export Clause provides, in pertinent part:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . ." U.S. Const., art. I, § 10, cl. 2.

Reynolds asserts that the Clause prohibits the imposition of nondiscriminatory ad valorem taxes on the subject property. Recent decisions of the Supreme Court of the United States offer definitive guidance as to the purpose and scope of this constitutional provision.

In *Michelin Tire Corp., supra,* the Court considered the issue of whether Georgia was barred under the Import-Export Clause from assessing a nondiscriminatory ad

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exempts property in customs bonded warehouses from local property taxation. It is well established that the Court "cannot decide issues raised for the first time here." *Tacon v. Arizona*, 410 U.S. 351, 352 (1973). Even so, the direct and complete response to this assertion is that the subject imported tobacco is not in a foreign trade zone. Appellant attempts at this late date to divert the Court's attention from the issue in this case.

The 1984 amendment was intended to address Texas' peculiar inability under its constitution to provide legislatively for an exemption from property taxes on property in Foreign Trade Zones (App. H, p. 50a; App. J, p. 55a). North Carolina and other states have no such impediment. North Carolina has provided by statute since 1978 that property stored in a Foreign Trade Zone is exempt from property taxation. N.C. Gen. Stat. 105-275(23).

[9] Reynolds raised issues under the Import-Export and Due Process Clauses for the first time in the North Carolina Court of Appeals. Only the *Xerox* (preemption) issue was presented at the local level and to the North Carolina Property Tax Commission (App. D, p. 22a; App. 1, p. 1a; fn. 2, *supra*). Notwithstanding, the North Carolina Court of Appeals fully addressed the Import-Export and Due Process arguments (App. C, pp. 9a-12a, 16a-18a).



valorem property tax against imported goods stored as inventory in warehouses of the taxpayer. The Court articulated the primary objectives behind the constitutional prohibition against the laying of imposts or duties by states:

> "the Federal Government must speak with one voice when regulating commercial relations with foreign governments and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically." 423 U.S. at 285, 286.

In holding that the local property tax was not in violation of the Import-Export Clause, *regardless* of whether the goods had technically lost their status as "imports" at the time the tax was assessed, 423 U.S. at 279, the Court stated: "a nondiscriminatory ad valorem property tax is not the type of state exaction which the Framers of the Constitution . . . had in mind as being an 'impost' or 'duty.'" *Id.* at 283.

Even more recently, in *Limbach v. Hooven and Allison Company,* —— U.S. —— (No. 83-96, 1984), concerning imported fibers being stored for domestic manufacturing use, the Court reiterated:

> "To repeat: we think it clear that this Court in *Michelin* specifically abandoned the concept that the Import-Export Clause constituted a broad prohibition against all forms of state taxation that fell on imports. *Michelin* changed the focus of Import-Import Clause cases from the nature of the goods as imports to the nature of the tax at issue. *The new focus is*

> *not on whether the goods have lost their status as imports but is, instead, on whether the tax sought to be imposed is an 'Impost or Duty.'* " —— U.S. at —— (emphasis added).

Moreover, as the Court explained, "imposts" or "duties" "historically connoted exactions directed *only* at imports or commercial activities *as such.*" —— U.S. —— (emphasis added).

It is clear that the prohibition in the Import-Export Clause against the laying of imposts or duties by States is entirely inapposite to this appeal. The nondiscriminatory property taxes assessed against appellant's imported tobacco were not levied on these goods because they are imports but rather because they are physically located within, and receive full governmental services from, the taxing jurisdictions. As such, the tax does not "interfere with the free flow of imported goods among the states . . .," *Limbach, supra,* —— U.S. ——. Indeed,

> "[i]t is obvious that such nondiscriminatory property taxation can have no impact whatsover on the Federal Government's exclusive regulation of foreign commerce, . . . [since] [b]y definition, such a tax does not fall on imports as such because of their place of origin." *Michelin Tire Corp., supra,* 423 U.S. at 286 (brackets added).

## III. IT IS CONSISTENT WITH PRINCIPLES OF DUE PROCESS FOR CITY AND COUNTY GOVERNMENTS TO COLLECT AD VALOREM TAXES ON PROPERTY WHICH IS PHYSICALLY LOCATED WITHIN THOSE COMMUNITIES AND RECEIVES LOCAL GOVERNMENTAL SERVICES.

The Supreme Court of the United States has enunciated the standards to be applied in determining whether a challenged tax is permissible under constitutional principles of due process (Amendment XIV, Section 1). The pertinent inquiry is:



> "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." *Wisconsin v. J. C. Penney Co.,* 311 U.S. at 444 (1940).

*See also, Michelin Tire Corp., supra,* 423 U.S. at 289; *American Smelting, supra,* 77 Cal. Rptr. at 600.

On this record, the "simple but controlling question" from *J. C. Penney* is clearly answered "Yes." It is undisputed that the imported tobacco which has been made subject to local property taxes is physically located within the respective taxing jurisdictions in Durham and Forsyth Counties. It is not "in transit" but is present for manufacturing into finished tobacco products. It has reached its destination (App. D, p. 31a, findings 39, 40 and 43). It is also undisputed that this tobacco, like other personal property located within the boundaries of the respective political subdivisions, receives the full panoply of local governmental services including police and fire protection, and garbage collection (App. D, p. 32a). Furthermore, the imported tobacco is taxed at the identical rate as domestic tobacco of equal value (App. D, p. 32a) and thus, the taxes are nondiscriminatory in nature.

None of the cases cited by appellant in support of its Due Process argument arose in the context presented herein of imposition of local property taxes on imported goods stored in customs bonded warehouses for domestic use. They all predate *Michelin.*

Appellant is a New Jersey corporation with its principal offices in Winston-Salem, North Carolina (App. D, p. 26a). The imported tobacco at issue herein is located in Durham and Forsyth Counties for use in the domestic manufacture of finished tobacco products at appellant's facilities in Forsyth County (App. D, pp. 28a-32a). These are the *only* manufacturing facilities in which Reynolds produces a finished product (App. 1, p. 1a). It is appar-

ent that the actual situs of the imported tobacco is its physical location within the respective counties and municipalities. The nondiscriminatory ad valorem taxes assessed in this case are therefore entirely consistent with due process.

## CONCLUSION

The subject imported tobacco has come to Forsyth County for many years to be used there in Reynolds' manufacturing operations. The nondiscriminatory ad valorem tax at issue in no manner interferes with the right of the United States government to promote foreign commerce or to collect duties at such time as Reynolds elects to remove the property from bond. By its rulings in *Xerox*, *American Smelting*, and *Michelin*, the United States Supreme Court has rendered insubstantial the questions presented in this appeal. No conflict of opinions is present. The appeal should be dismissed. If, however, the Court feels that it has jurisdiction, the Court should not grant the case plenary consideration but should summarily affirm. *Certiorari* should also be denied for the foregoing reasons.

Respectfully submitted,

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## APPENDIX 1

**Portions of the Transcript of Testimony before the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review**

**October 27, 1983**

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TESTIMONY OF JAMES T. BARG, MANAGER
OF PROPERTY TAX ADMINISTRATION,
R. J. REYNOLDS INDUSTRIES

* * * *

[39] BY MR. PRICE:

Q. Isn't it correct that this claim which was involved in this case as set forth in Exhibits 5-A and 5-B is based upon the Xerox Supreme Court decision?

A. I would say that's correct.

Q. Which was handed down in December of 1982, is not that correct?

A. Yes. That's correct.

* * * *

[45] This tobacco, imported tobacco, has been coming to Forsyth County for manufacturing purposes for many years, is that correct?

A. We have had imported tobaccos, yes, coming to Forsyth County for many years.

Q. For manufacturing purposes?

A. That's correct.

Q. For manufacturing in Winston-Salem at your plants?

A. Yes. Those are the only manufacturing facilities in which we produce a finished product, is in the City of Winston-Salem, at this point in time.

* * * *

## TESTIMONY OF HARRY L. SAPP, ASSISTANT STORAGE MANAGER, R. J. REYNOLDS TOBACCO COMPANY

* * * *

[131] BY MR. PRICE:

Q. How much import duties had been paid on the tobacco which is the subject of this case, Federal Government duties?

A. From the information that I have seen, thirty-five to forty million.

Q. Do you know how much has been paid to date, so far, on this tobacco?

A. (No response)

Q. In Federal Import Duties?

A. I don't keep up with that, but I did see it on a memo, it seemed like, at Whitaker Park, was about, or Forsyth County, was like ten million dollars had been paid up through like September.

Q. Do you know how much will be paid between then and, that is, September, and the end of this calendar [132] year?

A. It seems like on that memo it was something over three million dollars, probably we will pay yet, between September and the end of the year.

* * * *

[136] Q. It's not the question. The question is for this purpose of aging or storing this tobacco before it's used, could it just as well be stored in a warehouse of R. J. Reynolds Tobacco Company's which is not a Customs Warehouse, as far as it's need for the manufacturer?

A. Yes, sir.



## TESTIMONY OF W. HARVEY PARDUE, FORSYTH COUNTY/WINSTON-SALEM TAX SUPERVISOR

* * * *

[163] BY MR. MAXWELL:

Q. How long has this type of imported tobacco been coming to Forsyth County?

A. For as long as I have known anything about R. J. Reynolds Tobacco Company, which is a number of years.

Q. About how many years?

A. At least twenty-five.

Q. And why is this imported tobacco brought to Forsyth County?

A. Tobacco used in the manufacturing process in Forsyth County.

* * * *

## APPENDIX 2

**General Statutes of the State of North Carolina, Section 105-277(a) of Chapter 105, Subchapter II, Entitled "Listing, Appraisal, and Assessment of Property and Collection of Taxes on Property"**

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N.C. Gen. Stat. 105-277. Property classified for taxation at reduced rates; certain deductions.

(a) Agricultural Products in Storage.—Any agricultural product *held in storage in North Carolina by any manufacturer or processor for manufacturing or processing*, which product is of such nature as customarily to require storage and processing for periods of more than one year in order *to age or condition the product for manufacture*, is hereby designated a special class of property under authority of Article V, Sec. 2(2), of the North Carolina Constitution. Agricultural products so classified shall be taxed uniformly as a class in each local taxing unit at sixty percent (60%) of the rate levied for all purposes upon real property and other tangible personal property by the taxing unit in which the products are listed for taxation. (Chapter 1026, 1947 Session Laws). (emphasis added).

# REPLY

# BRIEF

Nos. 85-1021 and 85-1022

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

---

R. J. REYNOLDS TOBACCO COMPANY,
*Appellant,*

v.

DURHAM COUNTY, NORTH CAROLINA and
FORSYTH COUNTY, NORTH CAROLINA
and ITS AFFECTED MUNICIPALITIES,
*Appellees.*

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**On Appeals from the Supreme Court of North Carolina and the North Carolina Court of Appeals**

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## BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

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January, 1986

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**On Appeals from the Supreme Court of North Carolina and the North Carolina Court of Appeals**

---

## BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

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Durham County, North Carolina and Forsyth County, North Carolina and Its Affected Municipalities ("Appellees") have separately moved this Court to dismiss the appeals docketed by Reynolds or to affirm the judgments of the Supreme Court of North Carolina and the Court of Appeals of North Carolina.[1]

Both motions start from a premise that the only issue decided by this Court in *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982), was that state taxes on goods stored under bond in a customs warehouse and destined

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[1] Compliance with Rule 28.1 has been made in the Jurisdictional Statement, pp. ii, App. M, pp. 101a-102a.

for reexport are pre-empted by Congress' comprehensive regulation of customs duties. Appellees then argue that the issue of pre-emption of state taxes on goods stored under bond in a customs warehouse and destined for domestic use or consumption is governed by the summary disposition in *American Smelting & Refining Co. v. County of Contra Costa*, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570 (1969), *appeal dismissed*, 396 U.S. 273, *reh'g denied*, 397 U.S. 958 (1970). Both Motions, and particularly that of Forsyth County and Its Affected Municipalities ("Forsyth County"), then argue extensively on the merits that under the summary disposition in *American Smelting* no pre-emption exists with respect to goods destined for domestic use or consumption.[2]

The Motions are not persuasive.

## I. THE MOTIONS FAIL TO RECOGNIZE THAT *XEROX* IS A BROAD AND UNQUALIFIED DECISION THAT CONGRESS PRE-EMPTED STATE TAXATION OF ALL GOODS STORED UNDER BOND IN A CUSTOMS WAREHOUSE.

The correct statement as to the holding of this Court in *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982), is not found in Appellees' Motions to Dismiss or Affirm. True, the copying machines which the governmental units sought to tax in *Xerox*, having been assembled in Mexico, were placed in secure storage in the United States with the intention that they would be reexported. In addition, the Court did begin its opinion by stating that "We noted probable jurisdiction to decide whether a state may impose nondiscriminatory ad valorem personal property taxes on imported goods stored under bond in a customs warehouse and destined for foreign markets." *Id.* at 146. There was, thereafter, no limitation of the holding solely to goods destined for reexport.

In discussing the purposes and objectives of the Warehousing Act of 1846, the Court recognized that "a major objective of the warehousing system was to allow importers to defer payment of duty until the [imported] goods entered the domestic market or were exported." *Id.* at 150. The Court also stated that "Congress was willing . . . to defer, for a prescribed period, the duty on goods destined for American consumption" in order "to encourage merchants here and abroad to make use of American ports." *Id.* at 151. The Court then framed the pre-emption question as:

> whether it would be compatible with the comprehensive scheme Congress enacted to effect these goals if the states were free to tax *such goods* [an actual reference to "goods destined for American consumption"] while they were lodged temporarily in Government-regulated bonded storage in this country.

*Id.* at 151, emphasis added. The clear and comprehensive answer of the Court to this question was that:

> [S]tate property taxes on goods stored under bond in a customs warehouse are pre-empted by Congress' comprehensive regulation of customs duties.

*Id.* at 154.

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[2] Appellees have created a factual dispute that does not exist when discussing the ultimate use and disposition by Reynolds of the imported tobacco sought to be taxed. Durham County Motion, pp. 2-3; Forsyth County Motion, p. 12. The North Carolina Court of Appeals correctly noted in its opinion the "undisputed" fact that "Reynolds manufactures in Forsyth County finished tobacco products which it sells to wholesale distributors and other authorized purchasers in the United States and abroad." J.S. App. C, p. 6a. Thus, while "virtually all" of the finished tobacco products manufactured by Reynolds from the imported tobacco "are sold and consumed in the United States," some of the cigarettes manufactured from the imported tobacco are sold to "*authorized purchasers in . . . other countries*" (J.S. App. D, p. 26a; emphasis added).

Whenever finished cigarettes are exported, Reynolds is entitled under customs laws and regulations to a "drawback" of the duty paid on the imported tobacco contained in the finished product.

These unambiguous statements by the Court, together with its discussion of *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940), and the excerpts from the oral arguments quoted in the Jurisdictional Statement (p. 11), make it clear that the Court actually decided in *Xerox* that imported goods stored under bond in a customs warehouse are, under the pre-emption doctrine, not subject to state property taxes regardless of whether the goods are destined for domestic use or consumption or for reexport.[3]

## II. THE MOTIONS FAIL TO RECOGNIZE THAT THE SUMMARY DISMISSAL IN *AMERICAN SMELTING & REFINING CO.* WAS OVERRULED *SUB SILENTIO* IN *XEROX*.

In *Edelman v. Jordan*, 415 U.S. 651, 671 (1974), this Court stated that cases decided by summary disposition without opinions do not have "the same precedential value as . . . an opinion of this Court treating the question on the merits." Later, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981), this Court reaffirmed this principle as follows:

> . . . summary actions do not have the same authority in this court as do decisions rendered after plenary consideration. [Citations omitted.] They do not present the same justification for declining to reconsider a prior decision as do decisions rendered after argument and with full opinion. "It is not at all unusual for this Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 477, n.20 (1979); *see also Tully v. Griffin, Inc.*, 429 U.S. 68, 74-75 (1976); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976).

[3] In its opinion in the *Xerox* case (459 U.S. at 153) this Court said:

> Although there are factual distinctions between this case and *McGoldrick*, they are distinctions without a legal difference. We can discern no relevance to the issue of congressional intent in the fact that the fuel oil in *McGoldrick* could be sold only as ships' stores whereas Xerox had the option to pay the duty and withdraw the copiers for domestic sale . . .



The continuing validity of *American Smelting & Refining Co. v. County of Contra Costa*, 271 Cal. App. 2d 437, 77 Cal. Rtpr. 570 (1969), *appeal dismissed*, 396 U.S. 273, *reh'g denied*, 397 U.S. 958 (1970) is also undermined by the holding in *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), that summary dispositions extend only to "the precise issues presented and necessarily decided by those actions." *American Smelting & Refining Co.* involved the validity of a California property tax imposed on imported ores stored in a bonded "smelting and refining warehouse." Such warehouses are established pursuant to 19 U.S.C. § 1312, whose forerunner was the McKinley Tariff Act of 1890.[4] Thus, the Court was not presented with the legislative history of the customs bonded warehouse provisions involved in this case[5] when it considered the appeal in *American Smelting & Refining Co.* Moreover, the legislative history of the Warehousing Act of 1846[6] was not cited by the California Court of Appeals nor was it presented to this Court in the Jurisdictional Statement.

After *Xerox*, *American Smelting & Refining Co.* is no longer of value as a precedent, particularly as applied to the facts of this case.

[4] Ch. 1244, § 24, 26 Stat. 567, 617.

[5] 19 U.S.C. §§ 1555-1565.

[6] Ch. 84, 9 Stat. 53.

## III. STATE PROPERTY TAXES LEVIED ON ANY IMPORTED GOODS STORED IN A CUSTOMS BONDED WAREHOUSE IMPOSE AN OBSTACLE TO THE ACCOMPLISHMENT OF THE PURPOSES AND OBJECTIVES OF CONGRESS IN ENACTING THE WAREHOUSING ACT OF 1846 AND ITS PROGENY.

The test for pre-emption, which finds its origin in several opinions rendered prior to *Xerox*, was subsequently summarized in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). There this Court stated that:

> state law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. [Citations omitted.] If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress . . . .

The Court did not specifically state in *Xerox* in which of the "two general ways" it found congressional pre-emption to exist. The broad and unqualified conclusion to the opinion in *Xerox* would indicate a finding of total pre-emption. Moreover, specific references to the legislative history of the Warehousing Act of 1846 clearly evidence a conclusion that state taxation of any property in a customs bonded warehouse "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood*, 464 U.S. at 248.

Durham County ignores these considerations entirely in arguing its Motion, while Forsyth County merely states (pp. 10-11) that there is "no provision of the Tariff Act of 1930 which manifests an express Congressional intention to preempt [state] . . . taxes on imported goods held



in customs bonded warehouses for domestic use," and that "the imposition of [the] ad valorem taxes in issue [is not] inconsistent with the objectives of the Tariff Act of 1930 and its predecessor legislation." These unsupported assertions of Forsyth County are without merit for several reasons.

First, the rationale in *Xerox*, coupled with the Court's reliance there on *Fabbri v. Murphy*, 95 U.S. 191 (1877), and *District of Columbia v. International Distributing Corp.*, 118 U.S. App. D.C. 71, 331 F.2d 817 (1964), clearly show that this Court found an intention by Congress to divest the states of any control or jurisdiction over property stored in a customs bonded warehouse, regardless of the intended or possible use of the property by the importer when a decision is made to remove the property. Indeed, if this were not the basis for pre-emption in *Xerox*, the taxability of property stored in a customs bonded warehouse on the tax date would depend on the subjective intent of the owner with regard to the ultimate disposition of the property, or on an eventual decision, not known on the tax date. If a dispute arises between the taxing unit and the owner as to taxability, it could also cause the United States Customs Service to become entangled in the dispute because it is legally possessed of the property while in such storage.

Second, Appellees have chosen to dismiss as irrelevant the statutory exemption from state and local ad valorem property taxes which Congress in 1984 added to the Foreign Trade Zone Act.[7] As set forth in the Jurisdictional Statement (pp. 11-15), the legislative history of this recent congressional action clearly shows that Congress provided the exemption to goods stored in a Foreign Trade Zone in order that those goods would be on a parity with imported goods stored in a customs bonded warehouse. The sponsors of the 1984 amendment acted

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[7] Pub. L. No. 98-573, Sec. 231(b), 98 Stat. 2948, 2991 (1984).

because it was understood that all imported goods stored in a customs bonded warehouse were free from state and local property taxation under the *Xerox* decision. Congress considered customs bonded warehouses and Foreign Trade Zones as separate but consistent elements of a single structure of customs policy. For the Court to hold now that property stored in customs bonded warehouses and destined for domestic use is subject to state and local property taxation, while similar property with a similar destination stored in a Foreign Trade Zone is not, would inject the difference of treatment which Congress so clearly was trying to avoid.

Finally, it is clear that the purpose of Congress in enacting the Warehousing Act of 1846 was to remove barriers to the warehousing in this country of goods imported for ultimate use or consumption here. Allowing even nondiscriminatory state and local property taxes to be imposed on such goods stored in a customs bonded warehouse would clearly create an incentive for the storage of such goods abroad until they were ready for use or consumption in this country. The state taxing law of North Carolina as applied in this case stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, and should be held invalid.

## IV. IMPORTED GOODS STORED IN CUSTOMS BONDED WAREHOUSES ARE NOT WITHIN THE TAXING JURISDICTION OF THE INDIVIDUAL STATES.

Reynolds alternatively claimed in these appeals that the North Carolina property tax levied on its imported property stored in customs bonded warehouses was proscribed by the Due Process Clause of the United States Constitution. This is an issue of first impression for the Court.

Reynolds' claim is squarely based on a conclusion of law enunciated in prior cases and approved in *Xerox*



*Corp. v. County of Harris*, 459 U.S. 145 (1982), that "Congress intended to make customs bonded warehouses federal enclaves free of state taxation" and that such goods, although "physically" present within a taxing jurisdiction, are not subject to tax until they are "removed from the warehouse." *Id.* at 154. *See also Fabbri v. Murphy*, 95 U.S. 191, 197-198 (1877), and *District of Columbia v. International Distributing Corp.*, 118 U.S. App. D.C. 71, 331 F.2d 817 (1964).

Appellees argue that the test set forth in *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940), is controlling in determining whether the tax in issue here is constitutionally valid. Appellees' reliance on this case is clearly erroneous.

The tax in issue here is a property tax, not a franchise tax or an income tax. The fact that Reynolds engages in business in North Carolina is not relevant in determining the validity of the tax. The fact that Durham County and Forsyth County provide police and fire protection to real and tangible personal property owned by Reynolds and situated within their respective territorial boundaries is also irrelevant. In order to sustain the validity of the property tax here, it must be shown that the property sought to be taxed is within the jurisdiction of the authority seeking to impose the tax. *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 204 (1905). Under *Fabbri* and its progeny, the property in issue here is not within the Appellees' taxing jurisdiction.

## CONCLUSION

The Motions to Dismiss are without merit. Probable jurisdiction should be noted, or the judgments below should be reversed.

Respectfully submitted,

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*Counsel for Appellant*

January, 1986

# JOINT

# APPENDIX

(6) (6)

**Nos. 85-1021 and 85-1022**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985



R. J. REYNOLDS TOBACCO COMPANY,
*Appellant,*

v.

DURHAM COUNTY, NORTH CAROLINA, *et al.*,
*Appellees.*

**On Appeals from the Supreme Court of North Carolina and the North Carolina Court of Appeals**

## JOINT APPENDIX

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*Counsel for Appellees*

**JURISDICTIONAL STATEMENT FILED DECEMBER 16, 1985**
**QUESTION OF JURISDICTION OF APPEALS POSTPONED FEBRUARY 24, 1986**

**EDITOR'S NOTE**

**THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.**

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## RELEVANT DOCKET ENTRIES

I. *Tax listing and exemption requests*

1. March 30, 1983—Reynolds Durham County tax listing and request for exemption of subject imported tobacco.

2. April 15, 1983 —Reynolds Forsyth County tax listing and request for exemption of subject imported tobacco.

II. *Tax supervisor*

1. April 15, 1983 —Durham County tax supervisor letter denying request for exemption.

2. June 2, 1983 —Forsyth County tax supervisor letter denying request for exemption.

III. *Local Board of Equalization and Review*

1. June 3, 1983 —Durham County Board of Equalization and Review letter denying request for exemption, after hearing.

2. June 29, 1983 —Forsyth County Board of Equalization and Review letter denying request for exemption, after hearing.

IV. *North Carolina Property Tax Commission, sitting as the State Board of Equalization and Review*

1. June 15, 1983 —Reynolds Notice of Hearing and Application for Hearing before North Carolina Property Tax Commission (Durham County) filed.

2. July 6, 1983 —Durham County Motion to Dismiss filed.

3. July 8, 1983 —Reynolds Notice of Hearing and Application for Hearing before North Carolina Property Tax Commission (Forsyth County) filed.

4. July 25, 1983 —Response of Forsyth County and Affected Municipalities to Notice & Application for Hearing filed.

5. Sept. 7, 1983 —Amended Response of Forsyth County and Affected Municipalities to Notice & Application for Hearing filed.

6. Oct. 27, 1983 —Prehearing order filed (Durham County)

7. Oct. 27, 1983 —Prehearing order filed (Forsyth County)

8. Dec. 14, 1983 —Final Decision of North Carolina Property Commission entered.

9. Jan. 13, 1984 —Notice of Appeal and Exceptions to North Carolina Court of Appeals filed. (N.C. Gen. Stat. 105-345)

V. *North Carolina Court of Appeals*

1. March 19, 1985 —Opinion filed.

2. April 8, 1985 —Judgment and Certification to North Carolina Property Tax Commission entered.

VI. *North Carolina Supreme Court*

1. April 19, 1985 —Reynolds Notice of Appeal under North Carolina General Statutes § 7A-30 filed.

2. April 19, 1985 —Reynolds Petition for Discretionary Review under North Carolina General Statutes § 7A-31 filed.

3. April 29, 1985 —Motion to Dismiss (Durham County) filed.

4. April 29, 1985 —Response to Petition for Discretionary Review (Durham County) filed.

5. April 29, 1985 —Motion of Forsyth County and its Affected Municipalities to Dismiss Appeal filed.

6. April 29, 1985 —Response of Forsyth County and its Affected Municipalities to Petition for Discretionary Review filed.



7. Oct. 2, 1985 —Judgment Dismissing Appeal on Motion of Forsyth and Durham Counties and Denying Petition for Discretionary Review entered.

8. Nov. 14, 1985 —Notice of Appeal from the North Carolina Supreme Court to the Supreme Court of the United States filed.

VII. *North Carolina Court of Appeals*

1. Oct. 3, 1985 —Certification to North Carolina Property Tax Commission entered.

2. Nov. 14, 1985 —Notice of Appeal from the North Carolina Court of Appeals to the United States Supreme Court filed.

VIII. *United States Supreme Court*

1. Feb. 24, 1986 —Order of the United States Supreme Court in Cases Nos. 85-1021 and 85-1022 entered.

# 1983 BUSINESS PROPERTY STATEMENT OF R. J. REYNOLDS TOBACCO COMPANY FOR DURHAM COUNTY, NORTH CAROLINA PROPERTY TAX COMMISSION

RETURN TO:
TAX SUPERVISOR
JUDICIAL BUILDING
ROOM 206
DURHAM, N.C.

PROPERTY NOT LISTED DURING REGULAR LISTING PERIOD IS SUBJECT TO 10% LATE LIST PENALTY. LIST NO LATER THAN JANUARY 31.

READ INSTRUCTION SHEET PAGE TWO

R.DUR

YEAR 19 83

## DURHAM COUNTY, NORTH CAROLINA

## BUSINESS PROPERTY STATEMENT

NAME _____ CITY OR TOWN

ALSO: _____ (TOWNSHIP)

STATEMENT OF PERSONAL PROPERTY FIXED AND UNAFFIXED TO REALTY, LEASEHOLD IMPROVEMENTS AND INTANGIBLE PERSONALTY SPECIFIED, OWNED, CONTROLLED OR POSSESSED AND LOCATED OR HAVING TAX SITUS IN DURHAM COUNTY AS OF JANUARY 1. THIS STATEMENT IS REQUIRED OF ALL BUSINESS, INDUSTRIAL AND PROFESSIONAL TAXPAYERS, ORGANIZATIONS AND ASSOCIATIONS, EXEMPT OR NOT, PURSUANT TO G.S. 105-296(6), 105-309(D-1) AND 105-282.

1 TRADE NAME: REYNOLDS TOBACCO, R J R CO

2 MAILING ADDRESS: ATTN: Tax Department Fourth and Main Streets WINSTON SALEM NC 27102

| TWP | ACCOUNT NO |
|---|---|
| 62 | [redacted] |

← SHOW CHANGES

3 OWNERS'S NAME

SOCIAL SECURITY NO

4 LOCATION OF PROPERTY: Ellis Road (STREET OR RURAL ROAD NUMBER) CITY Durham

NAME OWNER OF REAL ESTATE WHERE PROPERTY IS SITUATED: R. J. Reynolds Tobacco Company PHONE 919-773-2560

**TAXPAYER CHECK HERE:**

4-A. Sole Proprietorship _____
Partnership _____
Corporation X

4-B. TYPE OF BUSINESS: Tobacco Products

DATE BUSINESS BEGAN IN DURHAM COUNTY

| TYPE OF PROPERTY | | 100% of *Cost (OMIT CENTS) | Accumulated Depreciation (OMIT CENTS) | NET (OMIT CENTS) | For Tax Office Use |
|---|---|---|---|---|---|
| 5 MER. HANDISE INVENTORY AND FINISHED MANUFACTURED OR PROCESSED GOODS | AS OF THE | | X X X X | X X X X | |
| 6 GOODS IN PROCESS OF MANUFACTURE | ENDING DATE | | X X X X | X X X X | |
| 7 RAW MATERIALS *Tobacco 100% = $9,457,373 | OF THE | (60%) 5,674,424 | X X X X | X X X X | |
| 8 SUPPLIES OF ALL KINDS | LATEST | 187,112 | X X X X | X X X X | |
| 9 MERCHANDISE NOT IN INVENTORY ABOVE CONSIGNED OR OTHERWISE GIVE OWNER'S NAME & ADDRESS IN SEC. 920 SEE INSTRUCTION #10 | COMPLETED | | X X X X | X X X X | |
| 10 MERCHANDISE IN TRANSIT | FISCAL | | X X X X | X X X X | |
| 11 MERCHANDISE AND OTHER PERSONALTY IN STORAGE SEE #4 | YEAR | | X X X X | X X X X | |
| 112 MACHINERY TOOLS AND RELATED EQUIPMENT | | | | | |
| 213 PROFESSIONAL EQUIPMENT OF ALL KINDS | | | | | |
| 314 FURNITURE FIXTURES OFFICE EQUIPMENT ALL OTHER EQUIPMENT | | 12,702 | 2,895 | 9,807 | |
| 415 LEASEHOLD IMPROVEMENTS ITEMIZE THOSE MADE IN PRIOR YEAR | | | | | |
| 516 SPECIAL EQUIPMENT DATA PROCESSING & COPYING | | | | | |
| 617 OTHER EQUIPMENT | | | | | |
| 718 AUTOS TRUCKS TRAILERS TRACTORS BOATS AIRCRAFT & OTHER VEHICLES ITEMIZE IN SECTION 718 | | 18,937 | 17,316 | 1,621 | |
| 819 PATENTS COPYRIGHTS FRANCHISES TRADE MARKS & BRANDS FORMULAE & SECRET PROCESSES GOOD WILL | | | | | |

* See attached schedule.

TOTALS →

Did you purchase, otherwise acquire, or move into Durham County during prior year any property of the type listed on lines 112 to 617 inclusive ..... yes ..... ? If "Yes", complete Sections A and B

* All cost must be 100%, including trade-in allowances & expense of transportation to Durham County, plus installation charges See Instruction B for items bought on time payment

Do you Have Personal Property At Various County Locations, Such As Service Station Equipment, Tanks, Pumps, Signs, Vending Machines, Amusement Devices, Musical, TVs, Freezers, Dispensers, etc? ..... no ..... If so, attach itemized list showing (1) Mfr's Name (2) Mod. & Brief Description (3) Year Mfg. (4) Your Cost Showing New or Used, and (5) Exact Location on January 1st

Are there items of personal property of any type whatsoever in your possession or at your place of business which you do not own ..... ? If "yes", give details in Sections 819 and 920 See instruction #10

List Here The Names of Concessions, Leased Departments, Affiliated Corporations & Others Located on Your Premises

Date Your Business Year Ends
December 31

**CAUTION** This form will be rejected and returned to you if all sections are not completed, or if unsigned. Authority: G.S. 105-311

## ACQUISITIONS DURING PRECEDING YEAR

A. ATTACH ITEMIZED LIST ALL ITEMS WITH COSTS (OTHER THAN INVENTORY OR VEHICLES) ACQUIRED DURING PRECEDING CALENDAR YEAR

| YEAR | 112 MACHINERY EQUIPMENT | 213 PROFESSIONAL EQUIPMENT | 314 FURNITURE FIXTURES | 415 LEASEHOLD IMPROVEMENTS | 516 SPECIAL EQUIPMENT MFG. JAN.-JUN. | 516 SPECIAL EQUIPMENT MFG. JUL.-DEC. | 617 OTHER |
|---|---|---|---|---|---|---|---|
| 82 | 4,034 | | | | | | |

USE ADDITIONAL SHEETS TO ITEMIZE

## REMOVALS OF PROPERTY DURING PRECEDING CALENDAR YEAR

ATTACH ITEMIZED LIST ALL ITEMS WITH COSTS (OTHER THAN INVENTORY OR VEHICLES) ACQUIRED DURING PRECEDING CALENDAR YEAR

| YEAR | 112 MACHINERY EQUIPMENT | 213 PROFESSIONAL EQUIPMENT | 314 FURNITURE FIXTURES | 415 LEASEHOLD IMPROVEMENTS | 516 SPECIAL EQUIPMENT MFG JAN.-JUN. | 516 SPECIAL EQUIPMENT MFG JUL.-DEC. | 617 OTHER |
|---|---|---|---|---|---|---|---|
| 82 | | | | | | | |
| 81 | | | | | | | |
| 80 | | | | NONE | | | |
| 79 | | | | | | | |
| 78 | | | | | | | |
| 77 | | | | | | | |
| 76 | | | | | | | |
| 75 | | | | | | | |
| PRIOR YEARS | | | | | | | |
| TOTAL COSTS | | | | | | | |

USE ADDITIONAL SHEETS TO ITEMIZE

## PERSONAL PROPERTY PREVIOUSLY OWNED MOVED INTO THE COUNTY

B. ATTACH ITEMIZED LIST ALL ITEMS WITH COSTS (OTHER THAN INVENTORY OR VEHICLES) MOVED DURING PRECEDING CALENDAR YEAR

| YEAR | 112 MACHINERY EQUIPMENT | 213 PROFESSIONAL EQUIPMENT | 314 FURNITURE FIXTURES | 415 LEASEHOLD IMPROVEMENTS | 516 SPECIAL EQUIPMENT MFG JAN.-JUN | 516 SPECIAL EQUIPMENT MFG JUL.-DEC | 617 OTHER |
|---|---|---|---|---|---|---|---|
| 82 | | | | | | | |
| 81 | | | | | | | |
| 80 | | | | NONE | | | |
| 79 | | | | | | | |
| 78 | | | | | | | |
| 77 | | | | | | | |
| 76 | | | | | | | |
| 75 | | | | | | | |
| PRIOR YEARS | | | | | | | |
| TOTAL COSTS | | | | | | | |

USE ADDITIONAL SHEETS TO ITEMIZE

## COMPLETE ALL SECTIONS OR INDICATE NEGATIVE

Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief this listing, including any accompanying statements, inven schedules and other information, is true and complete (If this affirmation is signed by an individual other than the taxpayer, he affirms that he is familiar with t tent and true value of all of the taxpayer's property subject to taxation in this county and that his affirmation is based on all the information of which he ha knowledge.) FOR: R. J. Reynolds Tobacco Company

Manager, Property Tax Administration

TAXPAYER'S SIGNATURE James T. Barg DATE March 30, 1983

James T. Barg

LIST TAKER _____ DATE _____

R. J. Reynolds Tobacco Company

Leaf Tobacco In Storage
City And County of Durham
December 31, 1982

In addition to the leaf tobacco listed on line 7 of the Business Property Statement, the following exempt leaf tobacco was also located in Durham County and the City of Durham at the Ellis Road storage facility as of December 31, 1982:

100% cost: $86,610,659 - Tobacco located in a U.S. Customs Bonded warehouse

# APPLICATION FOR PROPERTY TAX EXEMPTION— DURHAM COUNTY FOR R. J. REYNOLDS TOBACCO COMPANY, NORTH CAROLINA PROPERTY TAX COMMISSION

Form AV-10
(10-73)

## APPLICATION FOR PROPERTY TAX EXEMPTION

County Durham Town or City Durham

Owner R. J. Reynolds Tobacco Company

Address ATTN: Tax Dept., Fourth & Main Sts., Winston-Salem, NC 27102
(Street or Route) (Town) (State) (Zip Code)

1. Ellis Road, Durham, NC
Location of Property

**INSTRUCTIONS**

Under the provisions of G. S. 105-282, every owner of property claiming exemption or exclusion from property taxes must demonstrate that the property meets the statutory requirements for exemption or classification.

Claims for exemption or exclusion must be filed with the tax supervisor of the county in which the property is located during the statutory listing period. A separate claim must be filed with the tax office of any city or town in which property is located unless the city or town has entered into an agreement with the county to have the county accept and process the claims in the city or town's behalf.

Except as herein provided, a separate claim for exemption must be filed for each parcel of real estate. It should include all improvements and personal property situated thereon. In lieu of filing a separate application for each parcel, the applicant may file one claim for all property claimed as exempt along with a schedule listing each parcel of real property and each article or group of articles of personal property. The schedule must contain a full description of all of the property and complete information regarding its use.

The undersigned owner or authorized representative hereby petitions for exemption of the following described property:

2. Give complete description of property:
Land:
Improvements:
Personalty: Imported leaf tobacco stored in U.S. Custom Bonded warehouses.

3. List and explain the purposes for which the property is used:
Land:
Improvements:
Personalty: Imported leaf tobacco stored in U.S. Custom Bonded warehouses.

4. If any organization other than the owner uses the property, give the name of the organization, full particulars regarding its use of the property and the amount of any income received for such use.

5. Give your estimate of the true value in money of the property:
Land
Improvements
Personalty $86,610,659.00 (100%)

6. List the insurance value of the property:
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
$86,610,659.00

6. Upon what uses or purposes do you base this claim for exemption? Charitable ( ); Religious ( ); Educational ( ); Literary ( ); Scientific ( ); Other U.S. Constitutional Immunity

7. Give the specific statutory authority upon which this property is claimed as exempt: U.S. Supreme Court decision Xerox v Harris County December 13, 1982 and U.S. Constitution.

*(Full texts of all exemption and classification statutes are available at the office of the county tax supervisor.)*

**AFFIRMATION**

Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief, all information in this application is true and correct, and are made for the purpose of exempting the property herein described from taxation. FOR: R. J. Reynolds Tobacco Co.

March 30, 19 83
Date

Signature of owner or authorized representative

Manager, Property Tax Administration (919) 773-2560
Title Telephone No.

R. J. REYNOLDS TOBACCO COMPANY FOR
FORSYTH COUNTY—"KERNERSVILLE", NORTH
CAROLINA PROPERTY TAX COMMISSION

5.501 LISTING PERIOD EXTENDED TO MARCH 2 , 1983

# FORSYTH COUNTY
## BUSINESS PERSONAL PROPERTY LISTING 1983

MAIL ORIGINAL TO: TAX SUPERVISOR, P. O. BOX 757, WINSTON-SALEM, N. C., 27102-0757 ☐ PHONE (919) 727-2657

REYNOLDS R J TOB CO LEAF TOB
TRADE NAME 3

405 N MAIN ST
MAIL ADDRESS

WINSTON-SALEM, N.C. 27102 | 97728608 | 06 K
CITY STATE

STREET ADDRESS OF PROPERTY "Kernersville" TELEPHONE NO.

N C LAW REQUIRES LISTING OF ALL PROPERTY AS OF JANUARY 1 OF EACH YEAR EXCEPT AS PROVIDED IN G S 105 285 (c)

| DO NOT WRITE ON THIS LINE | INVENTORY | OFFICE AND PLANT EQUIP | HIGHWAY VEHICLES | NUMBER OF VEHICLES | VALUE OF PERSONAL PROPERTY | FOR TAX OFFICE USE ONLY: |
|---|---|---|---|---|---|---|
| | $123099140 | | | | $123099140 | |

(1) **COMPLETE ALL SECTIONS OF THIS FORM OR IT WILL BE REJECTED.**

The 1982 listing was made in name of R. J. Reynolds Tobacco Co. Date Business Established ____

Partnership: Names of Partners: ____

Sole Proprietorship owned by: ____ Social Security No. ____

N.C. Corporation—Principal office or place of business ____ Foreign Corporation—State of incorporation: New Jersey

List North Carolina Counties other than Forsyth in which this firm has Personal Property (Attach List)

Date as of which business year ends: December 31 (This is very important)

N. C. Corporation ☐ Foreign Corporation ☒ Partnership ☐ Proprietorship ☐

If out of business enter date operations ceased ____ Who now owns assets ____

Person to contact for audit (name, address, phone number) ____

Accounting records located at (complete address & zip code) ____

(2) **INVENTORIES: On ending date of your latest completed fiscal year at trade level where it rests.**

**OUTLET LEVEL NOT FACTORY COST LIFO NOT ACCEPTABLE**

Merchandise in Hands of Distributor, Distribution Point, Wholesaler, Retailer, 100% Cost $ ____

Merchandise in Hands of Public Warehouse For Distribution ____ 100% Cost $ ____

Consigned Merchandise Carried As Part of Your Assets At Your Cost ____ 100% Cost $ ____

Supplies & Packaging Materials ____ 100% Cost $ ____

[ATTACH SUBSTANTIATING SCHEDULE] Total Cost $ ____

(3) **INVENTORIES: As of ending date of your latest completed fiscal year at trade level where it rests.**

Raw Materials Leaf Tobacco in Storage 100% = $927,498 60% XXX 100% Cost $ 556,499

Goods in Process (Materials Including Labor & Mfg. Overhead) (See Attached Schedule) 100% Cost $ ____

Finished Products (Market Value) ____ 100% Cost $ ____

Supplies & Packaging Materials ____ 100% Cost $ ____

[ATTACH SUBSTANTIATING SCHEDULE] Total Cost $ 556,499

(4) **GOODS NOT IN INVENTORY ABOVE, CONSIGNED, FLOORING PLAN OR OTHERWISE.**

**N. C. Law requires all persons and Firms to report consigned goods in their possession to the Tax Supervisor. USE SPACE BELOW TO REPORT ALL GOODS THAT ARE NOT REPORTED IN YOUR INVENTORY. FAILURE TO DO SO WILL MAKE YOUR FIRM LIABLE FOR TAXES. IF MORE THAN ONE COMPANY ATTACH A LIST.**

NAME OF OWNER ____ VALUE $ ____

ADDRESS ____

TYPE OF MERCHANDISE

(5) **INVENTORIES: Figures to be taken directly from books; DO NOT DISCOUNT.**

ALL BUSINESS FIRMS OWNING MERCHANDISE MAY BE REQUIRED UPON REQUEST TO SUBMIT IN CONNECTION WITH THIS LISTING A COPY OF THEIR LATEST BALANCE SHEET, REGARDLESS OF CLOSING DATE, SHOWING ASSETS LOCATED IN FORSYTH COUNTY ONLY. A DETAILED SWORN AFFIDAVIT MAY BE USED IF NO BALANCE SHEET IS KEPT. STATEMENT TO INCLUDE METHOD OF ARRIVING AT INVENTORY VALUE. THIS INFORMATION IS CONFIDENTIAL. For: R. J. Reynolds Tobacco Co.

(6) OATH

UNDER PENALTIES PRESCRIBED BY LAW, I HEREBY AFFIRM THAT TO THE BEST OF MY KNOWLEDGE AND BELIEF THIS LISTING, INCLUDING ANY ACCOMPANYING STATEMENTS, SCHEDULES, AND OTHER INFORMATION, IS TRUE AND COMPLETE. LISTING MUST BE SIGNED BY A PRINCIPAL OFFICER OR FULL TIME EMPLOYEE AUTHORIZED BY TAXPAYER. "Leaf Tobacco Only"

See attached schedule

OFFICER'S SIGNATURE ____ DATE April 15 1983

TITLE Manager, Property Tax Admin.

TYPED SIGNATURE James T. Barg

PREPARED BY ____

TITLE ____

8

COMPLETE ALL SECTIONS OR INDICATE NEGATIVE

IRS REG 179 DOES NOT APPLY, SEE INSTRUCTION NOTE CONCERNING FIXED ASSETS

(7)

| MACHINERY, EQUIPMENT, OFFICE FURNITURE ACQUIRED SINCE JANUARY 1, 1982 | Full Cost Installed |
|---|---|
| ITEMIZE: IN DETAIL-ATTACH A SHEET IF THIS SPACE INADEQUATE: | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| TOTAL | |

(11)

| MACHINERY, EQUIPT., OFFICE FURNITURE DISPOSED OF SINCE JANUARY 1, 1982 | Year Acquired | COST |
|---|---|---|
| ITEMIZED FULLY | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| TOTAL | | |

ATTACH DEPRECIATION SCHEDULE

(8)

LIST ALL MOTOR VEHICLES TITLED IN NAME OF BUSINESS AS OF JANUARY 1, 1983

| | MAKE | YR | SERIES | TITLE NUMBER | VEHICLE ID NUMBER | TRAILER LENGTH | COST | DO NOT USE THIS SPACE TAX VALUE |
|---|---|---|---|---|---|---|---|---|
| 1 | | | | | | | | |
| 2 | | | | | | | | |
| 3 | | | | | | | | |
| 4 | | | | | | | | |
| 5 | | | | | | | | |
| 6 | | | | | | | | |
| 7 | | | | | | | | |
| 8 | | | | | | | | |
| 9 | | | | | | | | |
| 10 | | | | | | | | |
| 11 | | | | | | | | |

AIRPLANES OWNED

| | MAKE | YEAR | MODEL | COST |
|---|---|---|---|---|
| 1 | | | | |
| 2 | | | | |

(9)

LEASED MOTOR VEHICLES OR AIRPLANES

NAME OF OWNER

NAME OF PERSON OR COMPANY WHO WILL PAY TAX

ADDRESS

| | MAKE | YEAR | SERIES | CYL | TITLE NUMBER | |
|---|---|---|---|---|---|---|
| 1 | | | | | | |
| 2 | | | | | | |
| 3 | | | | | | |
| 4 | | | | | | |
| 5 | | | | | | |
| 6 | | | | | | |

(10)

List and describe any property which is not being listed at 100% of cost. Give appropriate general statute under which exemption or classification is claimed for any property.

(12)

LEASED EQUIPMENT

PLEASE PROVIDE THE FOLLOWING

1. NAME AND ADDRESS OF LESSOR
2. MAKE, MODEL AND SERIAL NUMBER OF EACH ITEM ON LEASE
3. DATE LEASE COMMENCED
4. MONTHLY OR ANNUAL RENT ON EACH ITEM ON LEASE

ATTACH DETAIL

(13)

LEASEHOLD IMPROVEMENTS NOT PREVIOUSLY REPORTED
GIVE FULL DETAILS AS TO WHAT IT COVERS

| ITEMS | COST |
|---|---|
| | |
| | |
| | |
| | |

OWNER OF BUILDING YOU OCCUPY WHERE LEASEHOLD IMPROVEMENTS HAVE BEEN MADE.

R. J. Reynolds Tobacco Company
Leaf Tobacco in Storage
Forsyth County/Kernersville
December 31, 1982

In addition to the leaf tobacco listed in "Section 3" of the return, the following exempt and or immune leaf tobacco was located in Forsyth County, Town of Kernersville in U. S. Custom Bonded Warehouses as of December 31, 1982.

This claim is based upon Constitutional Principles and cases decided by the United States Supreme Court.

100% cost: $247,675,428.00 - Tobacco held in U. S. Customs Bonded Warehouses

1983 BUSINESS PERSONAL PROPERTY LISTING OF
R. J. REYNOLDS TOBACCO COMPANY FOR
FORSYTH COUNTY—TURKISH LEAF, NORTH
CAROLINA PROPERTY TAX COMMISSION

5.502 LISTING PERIOD EXTENDED TO MARCH 2 , 1983

# FORSYTH COUNTY
## BUSINESS PERSONAL PROPERTY LISTING 1983

MAIL ORIGINAL TO: TAX SUPERVISOR, P. O. BOX 757, WINSTON-SALEM, N. C., 27102-0757 ☐ PHONE (919) 727-2657

N C LAW REQUIRES LISTING OF ALL PROPERTY AS OF JANUARY 1 OF EACH YEAR EXCEPT AS PROVIDED IN G S 105 285 (c)

REYNOLDS R J TOB CO TURKISH LEAF 3
TRADE NAME

405 N MAIN ST
MAIL ADDRESS

WINSTON-SALEM, N.C. 27102 | 977288598 | 15 A
CITY STATE

STREET ADDRESS OF PROPERTY TELEPHONE NO.

| DO NOT WRITE ON THIS LINE | INVENTORY | OFFICE AND PLANT EQUIP. | HIGHWAY VEHICLES | NUMBER OF VEHICLES | VALUE OF PERSONAL PROPERTY | FOR TAX OFFICE USE ONLY: |
|---|---|---|---|---|---|---|
| | $100439360 | | | | $100439360 | |
| | | | | | | |

**COMPLETE ALL SECTIONS OF THIS FORM OR IT WILL BE REJECTED.**

(1)

The 1982 listing was made in name of R. J. Reynolds Tobacco Company Date Business Established _____

Partnership: Names of Partners: _____

Sole Proprietorship owned by: _____ Social Security No. _____

N.C. Corporation—Principal office or place of business _____ Foreign Corporation—State of incorporation: New Jersey

List North Carolina Counties other than Forsyth in which this firm has Personal Property (Attach List)

_____

Date as of which business year ends: December 31 (This is very important)

N. C. Corporation ☐ Foreign Corporation ☒ Partnership ☐ Proprietorship ☐

If out of business enter date operations ceased _____ Who now owns assets _____

Person to contact for audit (name, address, phone number) _____

Accounting records located at (complete address & zip code) _____

(2)

**INVENTORIES: On ending date of your latest completed fiscal year at trade level where it rests.**

**OUTLET LEVEL NOT FACTORY COST LIFO NOT ACCEPTABLE**

| | |
|---|---|
| Merchandise in Hands of Distributor, Distribution Point, Wholesaler, Retailer, | 100% Cost $ _____ |
| Merchandise in Hands of Public Warehouse For Distribution _____ | 100% Cost $ _____ |
| Consigned Merchandise Carried As Part of Your Assets At Your Cost _____ | 100% Cost $ _____ |
| Supplies & Packaging Materials _____ | 100% Cost $ _____ |
| [ATTACH SUBSTANTIATING SCHEDULE] | Total Cost $ _____ |

(3)

**INVENTORIES: As of ending date of your latest completed fiscal year at trade level where it rests.**

| | |
|---|---|
| Raw Materials See attached schedule. | 100% Cost $ -0- |
| Goods in Process (Materials Including Labor & Mfg. Overhead) _____ | 100% Cost $ _____ |
| Finished Products (Market Value) _____ | 100% Cost $ _____ |
| Supplies & Packaging Materials _____ | 100% Cost $ _____ |
| [ATTACH SUBSTANTIATING SCHEDULE] | Total Cost $ -0- |

(4)

**GOODS NOT IN INVENTORY ABOVE, CONSIGNED, FLOORING PLAN OR OTHERWISE.**

**N. C. Law requires all persons and Firms to report consigned goods in their possession to the Tax Supervisor. USE SPACE BELOW TO REPORT ALL GOODS THAT ARE NOT REPORTED IN YOUR INVENTORY. FAILURE TO DO SO WILL MAKE YOUR FIRM LIABLE FOR TAXES. IF MORE THAN ONE COMPANY ATTACH A LIST.**

NAME OF OWNER _____ VALUE $ _____

ADDRESS _____

TYPE OF MERCHANDISE

(5)

**INVENTORIES: Figures to be taken directly from books; DO NOT DISCOUNT.**

ALL BUSINESS FIRMS OWNING MERCHANDISE MAY BE REQUIRED UPON REQUEST TO SUBMIT IN CONNECTION WITH THIS LISTING A COPY OF THEIR LATEST BALANCE SHEET, REGARDLESS OF CLOSING DATE, SHOWING ASSETS LOCATED IN FORSYTH COUNTY ONLY. A DETAILED SWORN AFFIDAVIT MAY BE USED IF NO BALANCE SHEET IS KEPT. STATEMENT TO INCLUDE METHOD OF ARRIVING AT INVENTORY VALUE. THIS INFORMATION IS CONFIDENTIAL.

FOR: R. J. Reynolds Tobacco Company

(6)

OATH

UNDER PENALTIES PRESCRIBED BY LAW, I HEREBY AFFIRM THAT TO THE BEST OF MY KNOWLEDGE AND BELIEF THIS LISTING, INCLUDING ANY ACCOMPANYING STATEMENTS, SCHEDULES, AND OTHER INFORMATION, IS TRUE AND COMPLETE. LISTING MUST BE SIGNED BY A PRINCIPAL OFFICER OR FULL TIME EMPLOYEE AUTHORIZED BY TAXPAYER.

Turkish Leaf Tobacco only.
See attached Schedule

OFFICER'S SIGNATURE _____ DATE 8/1

TITLE Manager, Property Tax Administration 1983

TYPED SIGNATURE James T. Barg

PREPARED BY _____

11

COMPLETE ALL SECTIONS OR INDICATE NEGATIVE

IRS REG 179 DOES NOT APPLY, SEE INSTRUCTION NOTE CONCERNING FIXED ASSETS

(7)

| MACHINERY, EQUIPMENT, OFFICE FURNITURE ACQUIRED SINCE JANUARY 1, 1982 | Full Cost Installed | MACHINERY, EQUIPT., OFFICE FURNITURE DISPOSED OF SINCE JANUARY 1, 1982 | Year Acquired | COST |
|---|---|---|---|---|
| ITEMIZE: IN DETAIL-ATTACH A SHEET IF THIS SPACE INADEQUATE: | | ITEMIZED FULLY | | |
| | | | | |
| | | | | |
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| | | | | |
| | | | | |
| | | | | |
| | | | | |
| TOTAL | | TOTAL | | |
| ATTACH DEPRECIATION SCHEDULE | | | | |

(11)

(8)

LIST ALL MOTOR VEHICLES TITLED IN NAME OF BUSINESS AS OF JANUARY 1, 1983

| | MAKE | YR | SERIES | TITLE NUMBER | VEHICLE ID NUMBER | TRAILER LENGTH | COST | DO NOT USE THIS SPACE TAX VALUE |
|---|---|---|---|---|---|---|---|---|
| 1 | | | | | | | | |
| 2 | | | | | | | | |
| 3 | | | | | | | | |
| 4 | | | | | | | | |
| 5 | | | | | | | | |
| 6 | | | | | | | | |
| 7 | | | | | | | | |
| 8 | | | | | | | | |
| 9 | | | | | | | | |
| 10 | | | | | | | | |
| 11 | | | | | | | | |

(12)

| AIRPLANES OWNED | | | |
|---|---|---|---|
| MAKE | YEAR | MODEL | COST |
| 1 | | | |
| 2 | | | |

LEASED EQUIPMENT

PLEASE PROVIDE THE FOLLOWING

1. NAME AND ADDRESS OF LESSOR
2. MAKE, MODEL AND SERIAL NUMBER OF EACH ITEM ON LEASE
3. DATE LEASE COMMENCED
4. MONTHLY OR ANNUAL RENT ON EACH ITEM ON LEASE

ATTACH DETAIL

(9)

LEASED MOTOR VEHICLES OR AIRPLANES

NAME OF OWNER

NAME OF PERSON OR COMPANY WHO WILL PAY TAX

ADDRESS

| MAKE | YEAR | SERIES | CYL | TITLE NUMBER | |
|---|---|---|---|---|---|
| 1 | | | | | |
| 2 | | | | | |
| 3 | | | | | |
| 4 | | | | | |
| 5 | | | | | |
| 6 | | | | | |

(13)

LEASEHOLD IMPROVEMENTS NOT PREVIOUSLY REPORTED
GIVE FULL DETAILS AS TO WHAT IT COVERS

| ITEMS | COST |
|---|---|
| | |
| | |
| | |
| | |

(10)

List and describe any property which is not being listed at 100% of cost. Give appropriate general statute under which exemption or classification is claimed for any property.

OWNER OF BUILDING YOU OCCUPY WHERE LEASEHOLD IMPROVEMENTS HAVE BEEN MADE.

R. J. Reynolds Tobacco Company
Leaf Tobacco in Storage
Winston-Salem, Forsyth County
December 31, 1982

The following exempt and or immune leaf tobacco was located in Winston-Salem, Forsyth County as of December 31, 1982.

This claim is based upon Constitutional Principles and cases decided by the United States Supreme Court.

100% cost = $184,773,440 - Tobacco Held in U. S. Customs Bonded Warehouses

**NOTICE OF DENIAL OF CLAIM FOR EXEMPTION OR IMMUNITY BY DURHAM COUNTY TAX SUPERVISOR, NORTH CAROLINA PROPERTY TAX COMMISSION**

*APPELLANT'S EXHIBIT NO. 2—LETTER (COUNTY OF DURHAM)* (April 15, 1983)

Mr. James T. Barg
Manager, Property Tax Administration
R. J. Reynolds Tobacco Company
Fourth and Main Streets
Winston-Salem, N. C. 27102

Re: Application for Property Tax Exemption

Dear Jim:

After having reviewed your application for property tax exemption which has been submitted to this office, I have determined that you have failed to carry your burden in establishing that you are entitled to tax exemption. As such, I am denying your application for exemption.

You may appeal this decision to the Board of Equalization and Review of Durham County pursuant to NCGS § 105-322.

Sincerely,

/s/ S. Bruce Mangum
S. BRUCE MANGUM
Tax Supervisor

cc: Clerk
City of Durham

**APPEAL FROM DENIAL BY DURHAM COUNTY TAX SUPERVISOR TO DURHAM COUNTY BOARD OF EQUALIZATION AND REVIEW, NORTH CAROLINA PROPERTY TAX COMMISSION**

*REAL OR PERSONAL PROPERTY COMPLAINT*
*DURHAM COUNTY*

TO: BOARD OF EQUALIZATION AND REVIEW
DURHAM COUNTY
DURHAM, NORTH CAROLINA

02—City Out TOWNSHIP
R. J. Reynolds Tobacco Co. OWNER

I, or we, desire to make complaint on the assessment of the following described property, to wit:

Imported leaf tobacco held in U.S. Customs bonded warehouses valued at $86,610,659 at 100% cost.

The reasons for making said complaint are as follows:

See Attachment.

Date April 29, 1983

Signature _____
Owner or Agent

Assessment by Board of Equalization and Review

$_____

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*ATTACHMENT TO REAL OR PERSONAL*
*PROPERTY COMPLAINT BLANK*
*DURHAM COUNTY*

The County Supervisor of Taxation has failed to grant immunity to the above-described tangible personal property from ad valorem taxation by the County and City of



Durham. The exclusion of such property from taxation is required under the principles set forth in XEROX CORPORATION v COUNTY OF HARRIS, TEXAS AND CITY OF HOUSTON, TEXAS, —— US —— 74 L Ed 2d 323 (1982), which held that imported property stored in Customs bonded premises was immune under the United States Constitution from state and local ad valorem taxes. Specifically, the Court held that state property taxes on goods stored under bond in Customs warehouses were preempted by the comprehensive regulation of Customs duties by Congress, as authorized under the Commerce clause of the U. S. Constitution.

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## NOTICE OF DENIAL OF CLAIM FOR EXEMPTION OR IMMUNITY BY FORSYTH COUNTY TAX SUPERVISOR, NORTH CAROLINA PROPERTY TAX COMMISSION

*LETTER (FORSYTH COUNTY)* (June 2, 1983)

Mr. James T. Barg
Manager, Property Tax Manager
R. J. Reynolds Tobacco Company
405 North Main Street
Winston-Salem, North Carolina 27102

Dear Mr. Barg:

With regard to the 1983 Forsyth County tax listing of R. J. Reynolds Tobacco Company for leaf tobacco, including Turkish Leaf, in storage in Winston-Salem and Kernersville, the subject tobacco will be taxed in accordance with GS 105-277(a) to the extent it qualifies. The claim for exemption or immunity upon Constitutional Principles and cases decided by the United States Supreme Court is denied.

Sincerely yours,

/s/ W. Harvey Pardue
W. HARVEY PARDUE
Tax Supervisor/Collector

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## FORSYTH COUNTY'S EXHIBIT 4: LETTER FROM HARVEY PARDUE TO JAMES BARG, NORTH CAROLINA PROPERTY TAX COMMISSION

*FORSYTH CO. EXHIBIT NO. 4—LETTER (FORSYTH COUNTY)* (June 3, 1983)

Mr. James T. Barg
Manager of Property Tax Administration
R. J. Reynolds Tobacco Company
405 North Main Street
Winston-Salem, North Carolina 27102

Dear Jim:

On May 4, 1983 I wrote to you for some information regarding "Tobacco held in U. S. Customs Bonded Warehouses." Following that request a meeting was held on May 19th with you and your representatives and my previously stated concerns were addressed.

A visit to the department, and an inspection of the documents related to inventory control for goods held in customs bonded warehouses satisfied my concerns regarding that particular question. I would however, like to have a copy of one of the vouchers for my file.

During our discussion on the 19th of May, Mr. McGrath stated that virtually 100% of the goods held in customs bonded warehouses ended up at one of the manufacturing plants in Forsyth County, and that import duties were eventually paid by Reynolds on 100% of those goods.

In the course of our discussion you may have named the local federal official who handles the collection of import duties for Reynolds, however, I don't have any recollection of who that person is. Just a name in my file will be sufficient for future reference.

Thank you for your cooperation.

Sincerely,

W. Harvey Pardue
Tax Supervisor/Collector

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**NOTICE OF FINAL RESOLUTION OF THE DURHAM COUNTY BOARD OF EQUALIZATION AND REVIEW UPHOLDING THE DURHAM COUNTY TAX SUPERVISOR'S DENIAL OF THE CLAIM FOR EXEMPTION OR IMMUNITY BY R. J. REYNOLDS TOBACCO COMPANY, NORTH CAROLINA PROPERTY TAX COMMISSION**

*LETTER (COUNTY OF DURHAM)* (June 3, 1983)

James T. Barg, Manager
Property Tax Administration
R. J. Reynolds Tobacco Company
Fourth and Main Streets
Winston-Salem, N. C. 27102

Re: Appeal to Board of Equalization and Review

Dear Mr. Barg:

As Clerk to the Board of Equalization and Review, I must inform you that the Board has confirmed the appraisal of the County of Durham, and denied your petition for exclusion of the tobacco leaf held in U. S. Customs Bonded Warehouses in Durham County. It is the opinion of the County that you have failed to show your entitlement to an exclusion of this leaf. It is also the opinion of the County that the case of XEROX CORPORATION v COUNTY OF HARRIS, TEXAS AND CITY OF HOUSTON, TEXAS, 74 L Ed 2d 323 (1982) is not controlling in the case before the Board.

Sincerely,

/s/ S. Bruce Mangum
S. BRUCE MANGUM
Clerk,
Board of Equalization and Review

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**APPEAL FROM DENIAL BY FORSYTH COUNTY TAX SUPEVISOR TO FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW, NORTH CAROLINA PROPERTY TAX COMMISSION**

*LETTER (RJR)* (June 13, 1983)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. W. Harvey Pardue
Tax Supervisor/Collector, Forsyth County
Courthouse Square, P. O. Box 757
Winston-Salem, North Carolina 27102

Dear Mr. Pardue:

Re: Ad Valorem Taxation of Tobacco Stored in U. S. Customs Service Bonded Warehouses

This letter is filed in order to formally protest and appeal the determination that tobacco stored in U. S. Customs bonded warehouses in Forsyth County is subject to ad valorem taxation by that jurisdiction. It is also formally requested that R. J. Reynolds Tobacco Company be given a hearing on this matter before the Forsyth County Board of Equalization and Review in order to properly contest this determination.

Such determination was officially communicated to the taxpayer by letter dated June 2, 1983, from the Office of the Forsyth County Tax Supervisor/Collector. This letter is attached hereto and incorporated into the present protest by reference.

Please direct all communications on this matter in my name to the Tax Department, R. J. Reynolds Industries, Inc., 4th & Main Streets, Winston-Salem, North Carolina, 27102.

Yours truly,

[James W. McGrath]

Attachment

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## FORSYTH COUNTY'S EXHIBIT 5: LETTER FROM JAMES BARG TO HARVEY PARDUE, NORTH CAROLINA PROPERTY TAX COMMISSION

*FORSYTH CO. EXHIBIT NO. 5—LETTER (R. J. REYNOLDS TOBACCO COMPANY)* (June 21, 1983)

W. Harvey Pardue
Tax Supervisor
Forsyth County
P. O. Box 757
Winston-Salem, NC 27102

Dear Harvey:

I am writing in response to your letter of June 3, 1983 concerning the issue of tobacco stored in U. S. Custom bonded warehouses.

The local federal official who is responsible for U. S. Custom bonded warehouses in this area is Mr. Enus Moss, and he is located in the Federal Building in Winston-Salem.

In paragraph three of your letter, you refer to a comment by Mr. McGrath at our meeting on the 19th of May. Your recollection of his comment is accurate.

I am enclosing a copy of one of the custom bonded documents as per your request.

If there are any other questions, please call me.

Sincerely,

/s/ James T. Barg
JAMES T. BARG
Manager,
Property Tax Administration

Attachment

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## NOTICE OF FINAL RESOLUTION OF THE FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW UPHOLDING THE FORSYTH COUNTY TAX SUPERVISOR'S DENIAL OF THE CLAIM FOR EXEMPTION OR IMMUNITY BY R. J. REYNOLDS TOBACCO COMPANY, NORTH CAROLINA PROPERTY TAX COMMISSION

*LETTER (FORSYTH COUNTY)* (June 29, 1983)

Mr. James W. McGrath, Director
Domestic Tax Law, Tax Department
R. J. Reynolds Industries, Inc.
Fourth and Main Streets
Winston-Salem, North Carolina 27102

Re: Tobacco Stored in U. S. Customs Bonded Warehouses

Dear Mr. McGrath:

At its meeting on June 22, 1983, the Forsyth County Board of Equalization and Review convened to hear oral and written arguments by R. J. Reynolds Tobacco Company concerning the tax status of the above referenced property for 1983. It was the decision of the Board of Equalization and Review that the taxpayer's request for exemption or immunity from taxation be denied and that the Stored Leaf Tobacco in U. S. Customs Bonded Warehouses is fully taxable in Forsyth County, North Carolina.

Any appeal of this decision must be made in writing to the North Carolina Property Tax Commission within thirty days from the date of this notice.

Sincerely,

/s/ W. Harvey Pardue
W. HARVEY PARDUE
Tax Supervisor/Collector

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**APPELLANT'S EXHIBIT 9: WAREHOUSE ENTRY PERMIT, NORTH CAROLINA PROPERTY TAX COMMISSION**

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# WAREHOUSE ~~DIRECT WAREHOUSE~~ ENTRY

U. S. Customs Service

## PERMIT

Form approved. O.M.B. No. 48-R0500

This Space For Customs Use Only

ENTRY NO. AND DATE: 016 83102472-1 05-16-83

Dist. and Port Code: 15-02

Port of Entry Name: Winston-Salem, NC

Term Bond No.: 5-269

Importer of Record (Name and Address): R. J. Reynolds Tobacco Company, P.O. Box 2959, Winston-Salem NC 27102 56-0375955

For Account of (Name and Address): Same

| Importing Vessel (Name) or Carrier | B/L or AWB No. | Port of Lading | I.T. No. and Date |
|---|---|---|---|
| S/S Dicle - Turk. | 1, 3, 4 | Bar | 78595532 05-09-83 |
| **Country of Exportation** | **Date of Exportation** | **Type and Date of Invoice** | **I.T. From (Port)** |
| Yugoslavia | 04-20-83 | 3 Commercial SEE BELOW | Richmond/Petersburg VA |
| **U.S. Port of Unlading** | **Date of Importation** | **Location of Goods: G.O. No.** | **I.T. Carrier (Delivering)** |
| Richmond/Petersburg VA | 05-08-83 | | Seaboard Coastline Ry. |

| MARKS & NUMBERS OF PACKAGES COUNTRY OF ORIGIN OF MERCHANDISE (1) | DESCRIPTION OF MERCHANDISE IN TERMS OF T.S.U.S. ANNO., NUMBER AND KIND OF PACKAGES (2) | GROSS WEIGHT IN POUNDS (2a) | NET QUANTITY IN T.S.U.S. ANNO. UNITS (2b) | EXAMINATION ORDER AND OTHER ACTION TO BE TAKEN |
|---|---|---|---|---|
| 36 Yugoslavia<br>61 RJH<br># 1/7180<br><br>c/o Yugoslavia | Makedonia Inv. #16, Skopje, 3/28/83<br><br>10,886 bales tob., Cig. Leaf, not stemmed, Oriental, not over 8.5" in length. | | | |
| 7 Yugoslavia<br>1 RJR<br>1/3706<br><br>c/o Yugoslavia | | 538,545 | 527,587 | |

APPELLANT'S EXHIBIT NO. 9

(Cut carbon on this line)

CONTINUED

Warehouse #184

TO THE INSPECTOR: Articles shall be examined, sampled, weighed, gauged, measured, stamped, and/or disposed of as directed. Release shall be made only to or upon the order of the carrier. Reports shall be endorsed hereon.

Robert J. Hollis
Customs Officer

Examined or sampled as directed

Date _____ Examiner or Sampler

Weighed, gauged, measured, stamped as directed (check one box, if applicable).

( ) Entered } Quantities Accepted
( ) Invoiced }
( ) See Reverse
See Attached Form 6001

Date _____ Weigher or Gauger

WINSTON-SALEM, N. C.
(Pier or Place)

Landed, released, or disposed of as directed, except as noted on the reverse. (If no exceptions show "None" in the following space.)

NONE

6-30-83
Date

Cynthia Tuttle
By (Title)

24

CUSTOMS FORM 7502-A

(All reports hereon must be dated and signed by the reporting officer)

Certified Correct

R. J. Reynolds Tobacco Co.

6-30-93 (Date)

Cynthia Tuttle (Signature and Title)

## RECORD OF CARTAGE OR LIGHTERAGE

Delivered to Cartman or Lighterman in apparent good condition except as noted above.

| CONVEYANCE | QUANTITY | | | RECEIVED | RECEIVED | |
|---|---|---|---|---|---|---|
| | | (Date) | (Inspector) | (Cartman or Lighterman) | (Date) | (Warehouse Prop.) |
| | | (Date) | (Inspector) | (Cartman or Lighterman) | (Date) | (Warehouse Prop.) |
| | | (Date) | (Inspector) | (Cartman or Lighterman) | (Date) | (Warehouse Prop.) |
| TOTAL | | | | | | (Warehouse Officer) |

WAREHOUSE OR REWAREHOUSE
PERMIT
Continuation Sheet

BUREAU OF CUSTOMS

Form approved.
Budget Bureau No. 48-R238.6.

This space for Customs use only
ENTRY NO. AND DATE
831U2472-1 05-16-83

| MARKS AND NUMBERS OF PACKAGES COUNTRY OF ORIGIN OF MERCHANDISE (1) | DESCRIPTION OF MERCHANDISE IN TERMS OF T.S.U.S. ANNO., NUMBER AND KIND OF PACKAGES (2) | | EXAMINATION ORDER AND OTHER ACTION TO BE TAKEN |
|---|---|---|---|
| | GROSS WEIGHT IN POUNDS (2a) | NET QUANTITY IN T.S.U.S. ANNO. UNITS (2b) | |
| 38 Yugoslavia<br>81 RJR<br>RA 1/10586<br><br>c/o Yugoslavia | Makedonia Inv. #17, Skopje, 3/28/83<br><br>10,586 bales tob. Cig. Leaf, not stemmed, Oriental, not over 8.5" in length. | | |
| | 563,753 | 551,150 | |
| 39 Yugoslavia<br>81 RJR<br>VH 1/3500<br><br>c/o Yugoslavia | Centroprom Inv., Bepgrad, 3/30/83<br><br>3,500 bales tob., Cig. Leaf, not stemmed, Oriental, not over 8.5" in length. | | |
| | 183,579 | 180,184 | |
| TOTAL | 24,972 Bales Tob. | | |
| | 1,285,877 | 1,268,921 | |
| | To be manipulated under Sec. 562, Tariff Act of 1930. | | |

(Cut carbon on this line)

CUSTOMS FORM 7502-C

**APPELLANT'S EXHIBIT 10: WAREHOUSE WITHDRAWAL FOR CONSUMPTION PERMIT, NORTH CAROLINA PROPERTY TAX COMMISSION**

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DUTY PAID

**WAREHOUSE WITHDRAWAL FOR CONSUMPTION**
**UNITED STATES CUSTOMS SERVICE**

Form approved. Budget Bureau No. 48-R2.

# PERMIT

This Space for Customs Use Only

WITHDRAWAL NO. AND DATE: OCT 07 1983 — 01

| Port of Entry Name | Dist. and Port Code | Whse. Bond No. and Date |
|---|---|---|
| Winston-Salem, NC | 15-02 | 84104301-9 October 4, 1983 |

| Importing Vessel (Name) or Carrier | Date of Importation |
|---|---|
| Various | Various |

Merchandise Entered By: R. J. Reynolds Tobacco Company, P.O. Box 2959, Winston-Salem, NC 27102

| MARKS & NUMBERS OF PACKAGES COUNTRY OF ORIGIN OF MERCHANDISE (1) | DESCRIPTION OF MERCHANDISE IN TERMS OF T.S.U.S. ANNO., NO. AND KIND OF PACKAGES (2) | NET QUANTITY IN T.S.U.S. ANNO. UNITS (2a) | Remarks |
|---|---|---|---|
| | 2,656 bales Filler Tob., Cig. Leaf, Not Stemmed. | | |
| Greece | | 48,746 | |
| Turkey | | 149,257 | |
| Yugoslavia | | 15,222 | |
| Italy | | 8,692 | |

PAID
$ 25,520.46
OCT 07 '83
BY _____
Cashier, U. S. Customs
Winston-Salem, N. C.

(Cut carbon on this line)

APPELLANT'S EXHIBIT NO. 10

| | |
|---|---|
| Bond | FINAL WITHDRAWAL |
| Withdrawal | |
| Balance | |

**TO THE WAREHOUSE OFFICER:**

Warehouse #001

Withdrawer R. J. Reynolds Tobacco Company
(Cut carbon on this line)

You are authorized to release the above-described merchandise to:
R. J. Reynolds Tobacco Co

Robert J. Hollis
Customs Officer

**TO THE DISTRICT DIRECTOR:**

| Hour and Date Permit Received | Date Entered on Record |
|---|---|
| 10-7-83 | 10-7-83 |
| **Date Goods Released** | **Date Permit Returned** |
| 10-7-83 | 10-11-83 |

Goods released in apparent good order, unless otherwise noted.

_____
Warehouse Officer

Release Report Correct: H. Allen
Warehouse Proprietor

CUSTOMS FORM MAY 68 7505-A

**NOTICE OF HEARING AND APPLICATION FOR HEARING BEFORE PROPERTY TAX COMMISSION RE DURHAM COUNTY BY R. J. REYNOLDS TOBACCO COMPANY FILED JUNE 15, 1983, NORTH CAROLINA PROPERTY TAX COMMISSION**

[Title omitted in printing]

TO THE PROPERTY TAX COMMISSION OF NORTH CAROLINA:

Comes now the appellant in person or through his lawful representative and respectfully shows as follows:

1. That on May 23, 1983, appellant appeared before the Durham County Board of Equalization and Review in the matter at issue in this appeal, and on that same date was notified of the said Board's decision.

2. That in its decision, the said Board held that the property in question was subject to ad valorem taxation in Durham County and that the true taxable value in money thereof as of January 1, 1983, was $86,610,659 at 100 percent value.

3. That appellant excepts to the decision of the County Board and in support thereof sets forth the following grounds of appeal:

The appellant excepts to the determination of the Board of Equalization and Review that imported tobacco stored in U.S. Customs Service bonded warehouses located in Durham County was not excluded from ad valorem taxation in accordance with the principle set forth by the United States Supreme Court in XEROX CORPORATION v COUNTY OF HARRIS, TEXAS, AND CITY OF HOUSTON, TEXAS, —— US ——, 74 L Ed 2d 323 (1982).

In that decision, the U.S. Supreme Court held that state property taxes on goods stored under bond in U.S. Customs Service warehouses were prempted [sic] because

of the comprehensive regulation of customs duties by Congress. It was further held in that case that Congress, in enacting legislation involving the imposition of Customs duties, clearly evidenced the intent to make Customs bonded warehouses free of state taxation, and that although imported goods may be physically within a taxing jurisdiction when stored in Customs bonded facilities, that such goods were not subject to the taxing powers of the jurisdiction until they were removed from the Customs bonded warehouse.

Because of the holding in the XEROX case, it is contended that the County of Durham could not properly impose its ad valorem tax on imported tobacco stored in U.S. Customs bonded warehouses within the County until such tobacco is removed from Customs bond.

WHEREFORE, the undersigned appellant makes application for hearing before the Property Tax Commission and respectfully requests that said Commission set a time and place for such hearing so that appellant's objections, as above set forth, may be presented to and considered by the said Commission.

Respectfully submitted this 14th day of June, 1983.

/s/ JAMES W. MCGRATH
Appellant
Assistant Secretary
R. J. Reynolds Tobacco Company

By: _____
Attorney at Law

Telephone No. (919) 773-2567

Name of Appellant: R. J. Reynolds Tobacco Company

Address of Appellant: 4th & Main Streets, Winston-Salem, North Carolina 27102



Location of Property Under Appeal: R. J. Reynolds Tobacco Company's Durham County U.S. Customs Service Bonded Warehouses

County Identification: 02-5837030

Description of Property Imported Strip Tobacco

| | Land | Improvements | Personal Property | Total |
|---|---|---|---|---|
| County Appraisal | | | $86,610,659 | $86,610,659 |
| Appellant's Appraisal | | | -0- | -0- |

**DURHAM COUNTY'S MOTION TO DISMISS
FILED JULY 6, 1983,
NORTH CAROLINA PROPERTY TAX COMMISSION**

[Title omitted in printing]

TO THE PROPERTY TAX COMMISSION OF NORTH CAROLINA:

Now comes the County of Durham, by and through its undersigned counsel, and says:

1. That R. J. Reynolds Tobacco Company made an application with the County of Durham for exemption of imported leaf tobacco stored in customs bonded warehouses in the County of Durham.

2. The Board of Equalization and Review of Durham County denied the application of R. J. Reynolds Tobacco Company and notified them of this denial of June 3, 1983.

3. That R. J. Reynolds Tobacco Company filed a Notice of Hearing and Application for Hearing with the following parties which was received on June 15, 1983:

Mr. S. Bruce Mangum
Clerk to the Durham County Board of
Commissioners
Room 206
County Judicial Building
Durham, North Carolina 27701

Lester W. Owen, Esquire
Durham County Attorney
Post Office Box 810
Durham, North Carolina 27702

Mr. S. Bruce Mangum
County Supervisor of Taxation
Room 206
County Judicial Building
Durham, North Carolina 27701



4. That Edmund Slade Swindell, Jr., is the Clerk of the Board of County Commissioners of Durham County during the time of the Application for Exemption and continuing to the present.

5. That R. J. Reynolds Tobacco Company has failed to perfect its appeal in that it has failed to file a written Notice of Appeal and a written statement of the grounds of appeal with the Clerk of the Board of County Commissioners of Durham County within thirty (30) days after the mailing of the notice of the decision of the Board of Equalization and Review as required by NCGS § 105-324.

NOW, THEREFORE, Plaintiff [sic] moves that this appeal be dismissed in that the Property Tax Commission lacks jurisdiction over the appeal.

This the 6th day of July, 1983.

/s/ S. C. KITCHEN
Assistant County Attorney for the
County of Durham

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**NOTICE OF HEARING AND APPLICATION FOR HEARING BEFORE PROPERTY TAX COMMISSION RE FORSYTH COUNTY BY R. J. REYNOLDS TOBACCO COMPANY FILED JULY 8, 1983, NORTH CAROLINA PROPERTY TAX COMMISSION**

[Title omitted in printing]

TO THE PROPERTY TAX COMMISSION OF NORTH CAROLINA:

Comes now the appellant in person or through his lawful representative and respectfully shows as follows:

1. That on June 22, 1983, appellant appeared before the Forsyth County Board of Equalization and Review in the matter at issue in this appeal, and on June 29, 1983, the appellant was notified of the said Board's decision.

2. That in its decision, the said Board held that the property in question was subject to ad valorem taxation in Forsyth County and that the true taxable value in money thereof as of January 1, 1983, was $432,448,868 at 100 percent value.

3. That appellant excepts to the decision of the County Board and in support thereof sets forth the following grounds of appeal.

The appellant excepts to the determination of the Board of Equalization and Review that imported tobacco stored in U.S. Customs Service bonded warehouses located in Forsyth County was not excluded from ad valorem taxation in accordance with the principle set forth by the United States Supreme Court in XEROX CORPORATION v COUNTY OF HARRIS, TEXAS, AND CITY HOUSTON, TEXAS, —— U.S. ——, 74 L Ed 323 (1982).

In that decision, the U.S. Supreme Court held that state property taxes on goods stored under bond in U.S. Customs Service warehouses were preempted because of



the comprehensive regulation of customs duties by Congress. It was further held in that case that Congress, in enacting legislation involving the imposition of customs duties, clearly evidenced the intent to make Customs bonded warehouses free of state taxation, and that although imported goods may be physically within a taxing jurisdiction when stored in Customs bonded facilities, that such goods were not subject to the taxing powers of the jurisdiction until they were removed from the Customs bonded warehouse.

Because of the holding in the XEROX case, it is contended that the County of Forsyth could not properly impose its ad valorem tax on imported tobacco stored in U.S. Customs bonded warehouses within the County until such tobacco is removed from Customs bond.

WHEREFORE, the undersigned appellant makes application for hearing before the Property Tax Commission and respectfully requests that said Commission set a time and place for such hearing so that appellant's objections, as above set forth, may be presented to and considered by the said Commission.

Respectfully submitted this 7th day of July, 1983.

/s/ J. W. McGRATH
Appellant
Assistant Secretary
R. J. Reynolds Tobacco Company

By: _____
Attorney at Law

Telephone No. (919) 773-2567

Name of Appellant: R. J. Reynolds Tobacco Company

Address of Appellant: 4th & Main Streets, Winston-Salem, North Carolina 27102

Location of Property Under Appeal R. J. Reynolds Tobacco Company's Forsyth County U.S. Customs Service Bonded Warehouses

County Identification: Turkish Leaf 15A
Leaf Tobacco 06K

Description of Property: Imported Strip Tobacco

| | Land | Improvements | Personal Property | Total |
|---|---|---|---|---|
| County Appraisal | | | $432,448,868 | $432,448,868 |
| Appellant's Appraisal | | | -0- | -0- |



**RESPONSE OF FORSYTH COUNTY AND ITS AFFECTED MUNICIPALITIES TO NOTICE AND APPLICATION FOR HEARING FILED JULY 25, 1983, NORTH CAROLINA PROPERTY TAX COMMISSION**

[Title omitted in printing]

Forsyth County, through counsel, responds on behalf of the County and its affected municipalities to the numbered paragraphs of the notice and application for hearing as follows:

1. Admitted.

2. Admitted, except the County conceded, and the Board of Equalization and Review acknowledged, that the subject property was taxable at only 60% of the normal rate as provided by N.C. Gen Stat 105-277(a).

3. Denied. The XEROX case does not apply to the facts of this case.

Further responding, Forsyth County shows the following:

4. The facts in the subject Reynolds case are different from those in the XEROX case cited by the appellant. In the XEROX case, parts for copiers were manufactured in the United States, shipped to Mexico for assembly, and thereafter stored in customs bonded warehouses in Houston. All of the copiers were designed for sale in Latin America, were not approved for domestic (United States) sale, and could not be sold in the United States without conversion. All of these copiers were held for export only, were sold abroad, and none were ever sold to customers for domestic use. No federal import duties were ever paid on these copiers since they were actually exported. Upon information and belief, Xerox paid property taxes on its other imported copiers located in Texas for domestic use.

5. The subject imported leaf tobacco owned by Reynolds is stored in customs bonded warehouses in Forsyth

County (Winston-Salem and Kernersville), which warehouse facilities are owned by Reynolds. Reynolds has acknowledged that this imported tobacco is taken from the customs bonded warehouses and then manufactured into tobacco products at its plants in Winston-Salem. This tobacco is used and sold domestically. Reynolds pays or will pay 100% of the federal import duties on all of the subject tobacco, which duties are substantial dollar amounts.

6. The subject tobacco receives all of the police, fire, and other county and municipal services and protection available to other property.

7. Forsyth County has granted the State law exemption under GS 105-277(a) so that in effect only 60% of the $432,448,868 value of this tobacco is being taxed.

WHEREFORE, having responded to the notice and application for hearing, Forsyth County and its affected municipalities pray that the Property Tax Commission find that the subject tobacco is not immune or exempt from property taxation under federal law.

This the 22 day of July, 1983.

/s/ P. EUGENE PRICE, JR.

/s/ JONATHAN V. MAXWELL
Attorneys for Forsyth County

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**AMENDED RESPONSE OF FORSYTH COUNTY AND ITS AFFECTED MUNICIPALITIES TO NOTICE AND APPLICATION FOR HEARING FILED SEPTEMBER 7, 1983, NORTH CAROLINA PROPERTY TAX COMMISSION**

[Title omitted in printing]

Forsyth County, on behalf of the County and its affected municipalities, hereby amends its response, dated July 22, 1983, to the notice and application for hearing to read as follows:

1. Admitted.

2. Admitted. A copy of the decision is attached hereto. [Attachment deleted; included elsewhere in Record]

3. Denied. The XEROX case does not apply to the facts of this case.

Further responding, Forsyth County shows the following:

4. The facts in the subject Reynolds case are different from those in the XEROX case cited by the appellant. In the XEROX case, parts for copiers were manufactured in the United States, shipped to Mexico for assembly, and thereafter stored in customs bonded warehouses in Houston. All of the copiers were designed for sale in Latin America, were not approved for domestic (United States) sale, and could not be sold in the United States without conversion. All of these copiers were held for export only, were sold abroad, and none were ever sold to customers for domestic use. No federal import duties were ever paid on these copiers since they were actually exported. Xerox paid property taxes on its other copiers located in Texas for domestic use.

5. The subject imported leaf tobacco owned by Reynolds is stored in customs bonded warehouses in Forsyth County (Winston-Salem and Kernersville), which ware-

house facilities are owned by Reynolds. Reynolds has acknowledged that this imported tobacco is taken from the customs bonded warehouses and then manufactured into tobacco products at its plants in Winston-Salem. This tobacco is used and sold domestically. Reynolds pays or will pay 100% of the federal import duties on all of the subject tobacco, which duties are substantial dollar amounts.

6. The subject tobacco receives all of the police, fire, and other county and municipal services and protection available to other property.

WHEREFORE, having responded to the notice and application for hearing, Forsyth County and its affected municipalities pray that the Property Tax Commission find that the subject tobacco is not immune or exempt from property taxation under federal law.

This the 2nd day of September, 1983.

/s/ P. EUGENE PRICE, JR.

/s/ JONATHAN V. MAXWELL
Attorneys for Forsyth County

(Verified by W. Harvey Pardue, this the 2nd day of September, 1983.)

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[North Carolina Property Tax Commission]

**ORDER ON FINAL PRE-HEARING CONFERENCE (DURHAM COUNTY)**

Pursuant to the rules of the North Carolina Property Tax Commission, a final pre-hearing conference was held in the above entitled cause on the 26th day of October, 1983. Thomas L. Kummer and Francis H. Skinner, Esquires, appeared as counsel for the appellant; S. C. Kitchen, Esquire, appeared as counsel for the County of Durham,

(1) Regarding whether all parties are property [sic] before the Commission, Durham County has filed a Motion to Dismiss on this topic; see Item (11)(b) below. Except as challenged in this Motion and subject to its disposition, all parties are properly before the Commission and the Commission has jurisdiction of the parties and the subject matter.

(2) It is stipulated that all parties have been correctly designated.

(3) In addition to the other stipulations contained herein parties hereto stipulate and agree with respect to the following undisupted [sic] facts:

(a) R. J. Reynolds Tobacco Company (hereinafter referred to as Reynolds) is a New Jersey Corporation qualified to do business in the State of North Carolina, with its principal offices and manufacturing facilities in Winston-Salem, Forsyth County, North Carolina.

Reynolds is engaged in Forsyth County, North Carolina, in the business of manufacturing finished tobacco products. Reynolds sells such products to wholesale distributors and other author-

ized purchasers in the United States and other countries.

(b) Durham County is a duly authorized taxing unit of the State of North Carolina. Durham County, through its tax supervisor, is duly authorized by law to administer tax assessment matters.

(c) Reynolds uses tobacco grown both in the United States and in foreign countries in manufacturing its finished tobacco products in Forsyth County.

(d) That R. J. Reynolds Tobacco Company made an application with the County of Durham for exemption or immunity of imported leaf tobacco stored in customs bonded warehouses in the County of Durham.

(e) The Board of Equalization and Review of Durham County denied the application of R. J. Reynolds Tobacco Company and notified them of this denial on June 3, 1983.

(f) That R. J. Reynolds Tobacco Company filed a Notice of Hearing and Application for Hearing with the following parties which was received on June 15, 1983:

Mr. S. Bruce Mangum
Clerk to the Durham County Board of Commissioners
Room 206
County Judicial Building
Durham, North Carolina 27701

Lester W. Owen, Esquire
Durham County Attorney
Post Office Box 810
Durham, North Carolina 27702



Mr. S. Bruce Mangum
County Supervisor of Taxation
Room 206
County Judicial Building
Durham, North Carolina 27701

(g) That Edmuand Slade Swindell, Jr., is the Clerk of the Board of County Commissioners of Durham County during the time of the Application for Exemption and continuing to the present.

(4) The following is a list of all known exhibits the appellant may wish to offer at the hearing:

(a) R. J. Reynolds Tobacco Company's 1983 Durham Property Listing dated March 30, 1983.

(b) Letter dated April 15, 1983, from S. Bruce Mangum, Durham County Tax Supervisor denying claim for immunity.

(c) Letter dated April 29, 1983, from Reynolds to the Durham County Board of Equalization & Review appealing this denial by the Tax Supervisor.

(d) Letter dated June 3, 1983, from the Durham County Tax Supervisor as Clerk for the Board of Equalization & Review denying the Claim for Immunity of the tobacco in question.

(e) Customs Form 7502—Warehouse or Rewarehouse Entry.

(f) Customs Form 3499—Application and Approval to Manipulate, Examine, Sample or Transfer Goods.

(g) Customs Form 7505—Warehouse Withdrawal for Consumption.

(5) The right to object at the hearing to any or all of these exhibits on grounds of relevancy and materiality is specifically reserved by the Durham County Attorney.

(6) It is stipulated and agreed that each of the exhibits identified by the appellant is genuine and, if relevant and material, may be received in evidence without further identification or proof.

(7) The following is a list of all known exhibits the County may offer at the hearing:

NONE

(8) It is stipulated and agreed that opposing counsel has been furnished a copy of each exhibit identified herein.

(9) The following is a list of all known witnesses which may be presented by the appellant at the hearing:

(a) James W. McGrath

(b) James T. Barg

(c) William R. Dull

(d) Harry L. Sapp

(e) Richard D. Moore

(10) The following is a list of all known witnesses which may be presented by the County at the hearing:

(a) S. Bruce Mangum

(b) E. S. Swindell, Jr.

(11) There are no pending motions and neither party desires further amendments to the pleadings, except:



(a) Motion by Reynolds to admit Francis H. Skinner, a member in good standing with the West Virginia Bar Association, to practice before the North Carolina Property Tax Commission for the limited purpose of presenting this matter.

(b) Motion to Dismiss this action filed by Durham County based upon notice requirements found in Sec. 105-324, NCGS.

(12) The appellant contends that the contested issue to be tried by the Commission is as follows: Whether imported tobacco stored in U.S. Customs Service bonded warehouses in Durham County on January 1, 1983, is subject to ad valorem taxation?

(13) The County contends that the contested issue to be tried by the Commission is: Is imported tobacco stored in U.S. Customs Serviced [sic] Bonded Warehouses located in Durham County excluded from ad valorem taxation by the ruling of the United States Supreme Court in XEROX CORPORATION v COUNTY OF HARRIS, TEXAS, AND CITY OF HOUSTON, TEXAS, 103 S Ct 523 (1982).

(14) Counsel for the parties announced that appropriate witnesses are available, the parties are ready for hearing, and the case is in all respects ready for hearing. The probable length of the hearing is estimated to be 4 hours.

(15) Counsel for the parties represent to the Commission that, in advance of the preparation of this Order, there was a full and frank discussion of settlement possibilities. Counsel for the appellant will immediately notify the Secretary to the Commission in the event of material change in settlement prospects.

Oct. 26, 1983
Date

/s/ Francis H. Skinner
FRANCIS H. SKINNER, Esquire
Counsel for Appellant

Oct. 26, 1983
Date

/s/ Thomas L. Kummer
THOMAS L. KUMMER, Esquire
Counsel for Appellant

Oct. 26, 1983
Date

/s/ S. C. Kitchen
S. C. KITCHEN, Esquire
Counsel for County of Durham

APPROVED AND ORDERED FILED

10/27/83
Date

/s/ C. E. Leatherman
Vice Chairman, North Carolina
Property Tax Commission

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[North Carolina Property Tax Commission]

**ORDER ON FINAL PRE-HEARING CONFERENCE (FORSYTH COUNTY AND AFFECTED MUNICIPALITIES)**

Pursuant to the rules of the North Carolina Property Tax Commission, a final pre-hearing conference was held in the above-entitled cause on the 26th day of October, 1983. Thomas L. Kummer and Francis H. Skinner, Esquires, appeared as counsel for the appellant; P. Eugene Price, Jr., and Jonathan V. Maxwell, Esquires, appeared as counsel for the County of Forsyth and affected municipalities.

(1) It is stipulated that all parties are properly before the Commission and that the Commission has jurisdiction of the parties and of the subject matter.

(2) It is stipulated that all parties have been correctly designated.

(3) In addition to the other stipulations contained herein, the parties hereto stipulate and agree with respect to the following undisputed facts:

(a) R. J. Reynolds Tobacco Company (hereinafter referred to as Reynolds) is a New Jersey Corporation qualified to do business in the State of North Carolina, with its principal offices and manufacturing facilities in Winston-Salem, Forsyth County, North Carolina.

Reynolds is engaged in Forsyth County, North Carolina, in the business of manufacturing finished tobacco products.

(b) Forsyth County, the City of Winston-Salem, and the Town of Kernersville are duly authorized taxing units of the State of North Carolina. Forsyth County, through its tax super-

visor, is duly authorized by law to administer tax assessment matters on its own behalf and on behalf of the City of Winston-Salem and Town of Kernersville.

(c) Reynolds uses tobacco grown both in the United States and in foreign countries in manufacturing its finished tobacco products in Forsyth County.

(4) The following is a list of all known exhibits the appellant may offer at the hearing:

(a) 1983 Forsyth County property tax listings of R. J. Reynolds Tobacco Company for the subject tobacco.

(b) Letter from the Forsyth County Tax Supervisor/Collector dated June 2, 1983, to James T. Barg.

(c) Letter from R. J. Reynolds Tobacco Company dated June 13, 1983, to W. Harvey Pardue.

(d) Letter from the Forsyth County Tax Supervisor/Collector dated June 29, 1983, to James W. McGrath of the decision of the Forsyth County Board of Equalization and Review.

(e) Customs Form 7502—Warehouse or Rewarehouse Entry.

(f) Customs Form 3499—Application and Approval to Manipulate, Examine, Sample or Transfer Goods.

(g) Customs Form 7505—Warehouse Withdrawal for Consumption.

(5) It is stipulated and agreed that the County's counsel has been furnished a copy of each exhibit identified by the appellant. The right has been reserved by the County to object to any or all of such



exhibits at the hearing on the grounds of relevancy and materiality.

(6) It is stipulated and agreed that each of the exhibits identified by the appellant is genuine and, if relevant and material, may be received in evidence without further identification or proof.

(7) The following is a list of all known exhibits the County may offer at the hearing:

(a) Any exhibit in paragraph (4) above.

(b) 1983-84 Forsyth County Budget Ordinance.

(c) 1983-84 City of Winston-Salem Budget Ordinance.

(d) 1983-84 Town of Kernersville Budget Ordinance.

(e) Letter from W. Harvey Pardue to James T. Barg dated June 3, 1983.

(f) Letter from James T. Barg to W. Harvey Pardue dated June 21, 1983.

(8) It is stipulated and agreed that R. J. Reynolds' counsel has been furnished a copy of each exhibit identified by the County. The appellant reserves the right to object at the hearing to any or all of these exhibits on the grounds of relevancy or materiality.

(9) It is stipulated and agreed that each of the exhibits identified by the County is genuine, and, if relevant and material, may be received in evidence without further identification or proof.

(10) The following is a list of all known witnesses which may be presented by the appellant at the hearing:

(a) James W. McGrath

(b) James T. Barg

(c) William R. Dull

(d) Harry L. Sapp

(e) Richard D. Moore

(11) The following is a list of all known witnesses which may be presented by the County at the hearing:

(a) W. Harvey Pardue

(12) There are no pending motions and neither party desires further amendments to the pleadings, except:

(a) Motion for admission of Francis H. Skinner, Esquire, an attorney licensed and in good standing with the West Virginia State Bar Association for the limited purpose of presenting this matter to the Property Tax Commission.

(13) The appellant contends that the contested issue to be tried by the Commission is as follows: Whether imported tobacco stored in U.S. Customs' bonded warehouses in Forsyth County on January 1, 1983, is subject to ad valorem taxation?

(14) The County contends that the contested issue to be tried by the Commission is as follows: Whether the subject imported tobacco held for domestic use in Forsyth County on January 1, 1983 is subject to ad valorem taxation under the XEROX case.

(15) Counsel for the parties announced that the parties are ready for hearing, and the case is in all respects ready for hearing. The probable length of the hearing is estimated to be 3 to 4 hours.

(16) Counsel for the parties represent to the Commission that, in advance of the preparation of this



Order, there was a full and frank discussion of settlement possibilities. Counsel for the appellant will immediately notify the Secretary to the Commission in the event of material change in settlement prospects.

/s/ FRANCIS H. SKINNER
/s/ THOMAS L. KUMMER
Counsel for
R. J. Reynolds Tobacco Company

Oct. 26, 1983
Date

/s/ P. EUGENE PRICE, JR.
/s/ JONATHAN V. MAXWELL
Counsel for Forsyth County and
its Affected Municipalities

October 26, 1983
Date

Approved and Ordered Filed.

10/27/83

/s/ C. E. LEATHERMAN
Vice Chairman, North Carolina
Property Tax Commission

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## EXTRACTS FROM TRANSCRIPT OF TESTIMONY PRESENTED TO THE NORTH CAROLINA PROPERTY TAX COMMISSION

### TESTIMONY OF JAMES T. BARG, MANAGER OF PROPERTY TAX ADMINISTRATION, R. J. REYNOLDS INDUSTRIES, INC.

[22] DIRECT EXAMINATION BY MR. SKINNER:

* * * *

Q. What is your title with R. J. Reynolds Industries?

A. I am Manager of Property Tax Administration.

Q. As Manager of Property Tax Administration, what are your duties?

A. My duties are that I am responsible for the compliance in the property tax area for those subsidiaries of R. J. Reynolds Industries which are located in [23] Winston-Salem, North Carolina.

Q. And by subsidiaries located in Winston-Salem, North Carolina, does that include R. J. Reynolds Tobacco Company?

A. Yes, it does.

* * * *

[35] CROSS-EXAMINATION BY MR. KITCHEN:

* * * *

[36] Q. In filing the listing which has been Exhibit Number 1, you listed imported leaf tobacco stored in United States Customs Bonded Warehouses, is that correct?

A. Yes.

[37] Q. You did not make any distinction there between any tobacco held for export or held for import, or, excuse me, held for manufacture?

A. That's correct. However, it is all imported tobacco.

Q. Is any of this tobacco held for export?

A. Not to the best of my knowledge, it is not.

Q. All right.



A. If you mean export? You mean out of the country?

Q. That's correct.

A. (Nods head)

Q. Your answer was that none of it is held for export, is that correct?

A. You mean export out of the country?

Q. Yes.

A. Okay. Yes.

* * * *

CROSS-EXAMINATION BY MR. PRICE

Q. Mr. Barg, in reference to your testimony up to [38] this time on Exhibits 5-A and 5-B?

A. Yes.

Q. Which are the tax return listings for 1983 for Forsyth County?

A. (Nods head)

Q. You read through the attachment which was attached to the formal listing. Previous to 1983, has R. J. Reynolds Tobacco Company ever made this claim for exemption on this basis, that is, constitutional principles in cases decided by the United States Supreme Court on its tax listings?

A. Going back in history, I'm trying to recollect back over history whether or not—

Q. (Interposing) On your listings?

A. I can only speak for the last six-and-a-half years within which I have served in my capacity as Manager of Property Tax Administration for R. J. Reynolds Industries and R. J. Reynolds Tobacco Company. It would be difficult for me to speak for the period prior to that, but during the period in which I have been responsible for the preparation and the signing of the returns, I do not believe that we have made a similar claim on this tobacco.

Q. All right. To your knowledge, before—

A. (Interposing) Can I clarify that?

[39] Q. Oh, I'm sorry.

A. As far as the listing, we did make, I did make a, I did file a letter concerning prior years, concerning this matter.

Q. Well, we are just speaking of the listings.

A. Listings themselves?

Q. Before this Commission.

A. Yeah.

Q. You have not?

A. (Nods head)

Q. But to your knowledge on prior listings prior to the time you became responsible for this duty of preparing these listings, to your knowledge did R. J. Reynolds Tobacco Company make such a claim on these listings?

A. I believe they may have.

Q. Isn't it correct that this claim which was involved in this case as set forth in Exhibits 5-A and 5-B is based upon the Xerox Supreme Court decision?

A. I would say that's correct.

Q. Which was handed down in December of 1982, is not that correct?

A. Yes. That's correct.

* * * *

[43] Q Isn't it correct, Mr. Barg, that this imported tobacco is used domestically in Winston-Salem, meaning that it is used in the manufacturing operations of R. J. Reynolds Tobacco Company plants and facilities in Winston-Salem?

A. That's correct.

Q. I believe you stated for Durham County, and I will ask you for Forsyth County, no part of the subject imported tobacco is held for export, is that correct?

A. (No response)

Q. That is export to foreign countries, or export—

A. (Interposing) I would have to say that the greatest majority of the tobacco would be used as you have stated in domestic production or production within the compounds located in the City of Winston-Salem. As I



cannot, you know, equivocally say that every single leaf [44] that no leaf ever left this country, but I can state what I stated a moment ago.

Q. Would you say virtually all of it goes to the manufacturing process?

A. I could say yes to that statement.

Q. And would you say that any amount that did [not] would be negligible, to say the least?

A. I would say that. Yes.

Q. So, virtually all of it is in the manufacturing process enters that process in Forsyth County, the manufacturing facility?

A. I would say yes to that statement.

Q. That is the purpose for which you bring this tobacco to Forsyth County, isn't it? That is, to manufacture it in connection with also domestic tobacco into a tobacco product?

A. That is my understanding. Yes.

Q. So, this subject imported tobacco is, and correct me if I am wrong, of course, blended with domestic tobacco, that is to be grown in the United States into finished tobacco products, basically cigarettes in Forsyth County and more particularly in Forsyth County?

A. I would say that is a correct statement.

Q. And these cigarette products are for sale and consumption in the United States, is that correct?

[45] A. Yes. Some of them are.

Q. Are all of them for sale and consumption in the United States?

A. Not all of our production, which you have identified as cigarettes. Not all of your cigarette consumption would be within the United States.

Q. Is virtually all of this for sale and consumption in the United States?

A. Could you restate that?

Q. Are virtually all of these tobacco products from which imported tobacco is blended, is it for sale and consumption in the United States?

A. I would say the greater majority would be.

Q. This tobacco, imported tobacco, has been coming to Forsyth County for manufacturing purposes for many years, is that correct?

A. We have had imported tobacco, yes, coming to Forsyth County for many years.

Q. For manufacturing purposes?

A. That's correct.

Q. For manufacturing in Winston-Salem at your plants?

A. Yes. Those are the only manufacturing facilities in which we produce a finished product, is in the City of Winston-Salem, at this point in time.

• • • •

[47] Q. Well, I think my question was where are these bonded warehouses located? That is, physically?

A. They are located in Winston-Salem and in Kernersville.

Q. Well, on whose property?

A. Okay. You didn't ask that. I'm sorry. These bonded warehouse facilities are owned by R. J. Reynolds Tobacco Company.

Q. They are on R. J. Reynolds Tobacco Company's property on their real property?

A. I say that the warehouses are owned by R. J. Reynolds Tobacco Company, which would be tantamount to their warehouses.

• • • •

[49] Q. Are some of these customs bonded warehouses inside the manufacturing plants where cigarettes and tobacco products are manufactured? Inside the physical building where they are manufactured?

A. There is at the Whitaker Park manufacturing [50] facility where finished products, finished tobacco products are manufactured, there is a small area which Mr. Price physically viewed, where tobacco is received that is still under United States Customs Bond. It is



a bonded area, and it is an area where tobacco is stored in a receiving area until the appropriate customs duties are paid and documentation has been perfected with the Federal Government and at that point in time that tobacco is removed from that very small physical area. I would say to assist the Board that that physical area is probably about the size of the first floor in this particular building. It is not larger than that.

Q. Now, I think for the record unless we know what the size of the first floor of this particular building is, it doesn't tell us how large it is. Could you express it in square feet, since you have reference to size?

A. In relationship to the structure within which it is located which is, as I mentioned, a small physical area within a larger building within which this larger building the manufacturing process of tobacco products is performed, and I would say that that area would be less than one-tenth, substantially less than one-tenth of the total square footage in that entire structure.

• • • •

[53] Q. Do you know what the, if you have any class number for the customs bonded warehouses, which I believe you referred to as storage shed areas, what they are called, what class they are?

A. I have heard a number, however. I have read the numbers.

Q. You do or don't know?

A. I believe it is a Class 8.

Q. Class 8? Now, generally speaking, isn't it correct that the imported tobacco which is stored in a customs bonded Class 8 area is removed from that area and placed in the customs bonded area within the manufacturing plant and from there it goes into the manufacture of tobacco products using also domestic tobacco, homegrown tobacco, isn't that correct?

A. In referring to that we don't confuse any issues. Since we are speaking completely about at this point in time Forsyth County, I would say that Mr. Price's comment is correct.

Q. Thank you. Now, these warehousing areas are private areas? That is, they are not used by anyone else other than R. J. Reynolds Tobacco Company, is that correct?

[54] A. That's correct.

Q. They are your warehouses, just—

A. (Interposing) They are owned and under, yes, they are owned by R. J. Reynolds Tobacco Company.

Q. And R. J. Reynolds Tobacco Company pays all the expenses of maintaining and supervising these warehouses and the tobacco which is stored in them, is that correct?

A. That's correct.

Q. All right. I think we have referred to the term "customs bonded." What does that mean?

A. What does it mean to me?

Q. Well, what does it mean?

A. What does it mean? Customs bonded area is an area that is, comes under the control of the Federal Government, and their rules and regulations, that apply to customs bonded facilities.

Q. Doesn't a customs bond mean a bond is put up by R. J. Reynolds Tobacco Company to secure the value, the payment of the import duty to the Federal Government?

A. That's correct.

Q. One thing I didn't mention when we were referring to the tobacco, imported tobacco coming out of the customs areas within the manufacturing plant, I think we mentioned that. When it comes out of that manufacturing [55] area, the customs bonded area, you pay import duty on it, or R. J. Reynolds Tobacco Company does, to the Federal Government to the full extent of whatever duties are owing, isn't that correct?

A. That's correct.

• • • •



[56] BY MR. PRICE:

Q. I believe you have testified that these customs bonded warehouses are private and they are on the real property of R. J. Reynolds Tobacco Company?

• • • •

A. Could I, can I restate something, just to clarify what you have just asked me? These structures that we refer to as United States Customs Bonded Warehouses, once again, these structures are owned by R. J. Reynolds Tobacco Company. The structures and the land. I just want to clarify that. The structures themselves are owned by R. J. Reynolds Tobacco Company. They are not buildings on leased lands. We own the structures and the land.

Q. Well, whose personnel are there to see that nobody breaks in and takes anything or to see that if other people come and want to go in there that have to check with somebody to make sure that they are properly authorized? Whose employees are those that do that?

A. These areas that we have referred to are controlled by security people. The security people may or may not be direct employees of R. J. Reynolds Tobacco Company; however, they serve the function of security [57] for all of our facilities, including these structures, United States Customs Bonded Warehouses which we have just been discussing.

Q. They are not federal officials, are they?

A. That's correct.

Q. And they are either employees of R. J. Reynolds Tobacco Company or private security agencies?

A. Correct.

Q. Which means they are hired by R. J. Reynolds Tobacco Company to secure their real property and buildings?

A. That's correct.

Q. In order to gain entrance to this property, you would have to have the permission of either the em-

ployee of R. J. Reynolds Tobacco Company on the site or either the private security agencies, which is employed by R. J. Reynolds Tobacco Company?

A. To enter the structures you would require the permission of the appropriate R. J. Reynolds Tobacco Company authorities.

Q. R. J. Reynolds Tobacco Company's employees?

A. R. J. Reynolds Tobacco Company's employees. Yes.

Q. Which are employed by R. J. Reynolds Tobacco Company?

[58] A. In other words, one of those security people couldn't just take someone and let them enter that building? They would have to have the appropriate R. J. Reynolds Tobacco Company's employee there to allow them to enter those structures.

Q. There are no federal customs officials situated on R. J. Reynolds Tobacco Company's property on any consistent basis or any basis at all, are there? Federal customs officials?

A. No. They are not customs officials. They are on a regular basis. However, they do come and review our books and records and our facilities.

Q. Upon R. J. Reynolds Tobacco Company's invitation?

A. No. Upon their invitation.

Q. How do they come?

A. By motor vehicle, and they come and inspect our books and records of R. J. Reynolds Tobacco Company.

Q. How often do they come?

A. I thought you said how do they come. I believe, I cannot speak specifically to exactly how often they come. It's my understanding they come periodically.

* * * *

[59] Q. Didn't you mention Class 8 Customs Bonded Warehouses? Your understanding was that the storage sheds in which this tobacco is stored are Class 8 Customs Bonded Warehouses?



A. That's correct.

Q. In these Customs Bonded Warehouses can you manipulate this imported tobacco while it's in this warehouse?

A. Yes. The word "manipulation" meaning turning, not, sometimes the term manipulation—the term is yes, these goods can be moved or turned.

Q. Can be moved or turned? Can you repack the imported tobacco?

A. If it's been damaged, yes.

Q. Does it have to be damaged before you can repack it?

A. I am not that familiar with each line and letter of the United States Customs Bonded rules and regulations, and so, since I do not work directly with them; however, it's my understanding that when things are [60] repacked, it would be because they have been damaged.

Q. And the turning in the moving of this tobacco, you mentioned this imported tobacco could be done in order to inhibit its deterioration?

A. That's correct.

Q Is it correct to say, Mr. Barg, that this imported tobacco and these bonded warehouses of R. J. Reynolds Tobacco Company benefit from and receive police and fire and other government services from Forsyth County and its municipalities?

A. I would say so.

Q. Now, would it be your testimony that when this imported tobacco is removed from the Customs Bonded Storage for R. J. Reynolds Tobacco Company manufacturing needs that customs duty is paid on that part of the tobacco that is withdrawn?

A. Could you rephrase that, please, sir? I'm sorry.

Q. Is it correct to state that when R. J. Reynolds Tobacco Company withdraws imported tobacco, the tobacco which is in issue today, from bonded storage for

its manufacturing needs that customs duty is paid to the Federal Government on all such tobacco withdrawn?

A. That is correct.

Q. And then after payment of the duty of this [61] imported tobacco along with domestic tobacco is blended into a manufactured finished product?

A. That's correct.

Q. Upon payment of these import duties, isn't R. J. Reynolds Tobacco Company free to remove this tobacco from customs at any time it chooses, anytime it chooses?

* * * *

A. When we have need for this tobacco that is located in United States Customs Bonded Warehouses, at that time we would pay the appropriate duties to the Federal Government.

BY MR. PRICE:

Q. I think my question was if you can remove it any time you wish upon payment of these duties?

A. That's correct.

Q. Now, when you say you needed, are you referring to needing it for manufacturing?

[62] A. That's what we have been discussing. Yes.

* * * *

[63] Q. Mr. Barg, I believe you have stated or testified that the imported tobacco which is the subject of this case is blended with domestic tobacco into finished tobacco products, is that correct?

A. That is correct.

Q. In Winston-Salem manufacturing facilities of the taxpayer?

A. Is that a question?

Q. Is my statement correct?

A. Yes, sir. That's correct.

* * * *

[67] Q. Mr. Barg, do you know the reason why R. J. Reynolds Tobacco Company stores tobacco in Customs Bonded Warehouses?



A. They would store the tobacco in United States Customs Bonded Warehouses in order to avail themselves of the Federal Rules and Regulations concerning duties on imported goods.

Q. Is it accurate to state then, based upon your testimony, in the last testimony you gave, that the reason R. J. Reynolds Tobacco Company stores their tobacco in the Customs Bonded Warehouses is to defer payment of federal import duties?

A. That's a true statement.

* * * *

[71] Q. Do you list and pay taxes? Does R. J. Reynolds Tobacco Company list and pay taxes on its domestic tobacco, Mr. Barg?

A. (No response)

Q. Say for the Year 1983?

A. In Forsyth County?

Q. Yes.

A. Yes.

Q. And also for in past years they have listed and paid taxes on their domestic tobacco?

[72] A. Yes.

* * * *

[73] REDIRECT EXAMINATION
BY MR. SKINNER:

Q. One question, Mr. Barg, referencing back your discussion of Class Two Customs Bonded Warehouses: I believe that you said that they are small, approximately one-tenth, substantially less than one-tenth the size of the manufacturing facility in which they are located. Could you give a little better idea in footage of what you are talking about when you talk in those terms?

A. These would be approximations. I would say that the area at what we earlier referred to as Whitaker Park, [74] that the area that comes under United States Customs Bonded control would be approximately now, maybe two hundred feet by two hundred feet, approximately.

Q. Thank you. Additionally in the discussion of customs, presence or lack of presence in the customs bonded warehouses that we are discussing, do customs agents appear at these facilities at any time for any purpose?

* * * *

Q. Specifically customs agents, is what we are referencing.

A. It's my understanding that yes, they do.

Q. For any purposes, specific purposes known to you?

A. It's my understanding that they come to review the books and records concerning the rules and regulations under the Customs Rules and Regulations to see whether or not our company is adhering to all of the steps that are required under these provisions.

Q. Do they need R. J. Reynolds Tobacco Company's [75] approval to enter the premises?

MR. PRICE: Objection.

VICE-CHAIRMAN LEATHERMAN: Overruled. Overruled.

MR. PRICE: He has already testified everyone that enters needs that approval.

VICE-CHAIRMAN LEATHERMAN: Objection overruled.

Upon your examination I will permit him to answer.

BY MR. SKINNER:

Q. If you don't know, you may state so.

A. I don't know what for the specific customs agents. I am not familiar with what powers that they would have to enter our facilities since they would be federal agents and not the normal individuals who would be entering our facilities.

* * * *



**TESTIMONY OF HARRY L. SAPP,**
**ASSISTANT STORAGE MANAGER,**
**R. J. REYNOLDS TOBACCO COMPANY**

[79] DIRECT EXAMINATION BY MR. KUMMER:

* * * *

[80] Q. Now, as Assistant Manager of the Truck and Storage Division, what are your responsibilities?

A. Our responsibilities are to receive and store the tobaccos that are needed for manufacturing.

Q. All right.

A. Imported tobaccos that come in.

Q. All right.

A. That we need and we purchase.

Q. Do you have a supervisory responsibility with respect to some type of facilities?

A. Yes, I do.

Q. Would you describe those facilities, please?

A. The facilities that we have is like in Durham, Kernersville, Whitaker Park, and we have to supervise the unloading of the tobacco, caring for the tobacco.

* * * *

[81] Q. (Interposing) Excuse me. Let me rephrase that: Is any of it grown in the United States?

A. No. No, this is tobacco that comes from Bulgaria, Turkey, Syria.

Q. Foreign countries, is what you are saying?

A. Foreign countries.

Q. Other than the United States?

[82] A. Right.

Q. Is there any tobacco stored in any of the facilities that you have just described as Customs Bonded Warehouses that was grown in the United States?

A. No.

Q. Now, are books and records maintained at these facilities?

A. Yes, sir.

Q. Are you responsible for supervising the maintenance of those books and records?

A. Yes, sir.

Q. Are you familiar with the procedure that is involved in bringing the tobacco into the United States and prior to its being stored in the warehouses that are under your supervision and control?

A. Yes, sir.

Q. Mr. Sapp, would you tell us what are the steps involved in bringing the tobacco that is grown in foreign countries into the United States and brought into your warehouse facilities, warehouse facilities that you are responsible for?

A. The tobacco comes in by, at the point of entry, by a bonded carrier. It is off loaded off the ships, transported to our storage facilities either by rail or truck, where we unload it, store it.

[83] Q. When is it placed in the United States Customs Bond?

A. When we unload it.

Q. All right.

A. We have, when the tobacco gets to Winston-Salem, or wherever there's a manifest that follows, a Customs manifest that comes with each container or a boxcar. These manifests are delivered or picked up by our people. They are custom documents stating that this tobacco is in bond, coming to our facilities, and what facilities it comes to. And the tobacco when it gets into our area, we get an entry number from United States Customs, an entry number that we stencil on each one of these bales as we put them into our storage warehouses.

Q. Does anything take place with respect to Customs Bond at the point of entry itself?

A. I don't know.

Q. Where does the manifest that you receive originate?

A. That originates, the manifest originates at the port.



Q. All right.

A. When it's loaded in the boxcar or container.

Q. So, when it's off loaded from the ship?

[84] A. Right. It's under the supervision of the Customs Bond Officials at the port. The manifest is prepared there.

Q. So, is the tobacco then in Customs Bond from the time it is off loaded off the ship and at all times thereafter, including the time that it reaches your warehouse facility?

A. Yes.

Q. Or the warehouse facility in question?

A. It's under Customs Bond all the time.

Q. Now, the facilities that are maintained as Customs Bonded Warehouses, are they classified in some way?

A. Yes. They are classified as Class Eight Warehouses.

Q. Now, you have testified that the bales are marked with a number from, from what does that number come, or how is that number derived?

A. When the tobacco arrives at the destination at our storage compounds, we notify our tobacco comptroller people that we have this tobacco in town. They in turn get with United States Customs, our local United States Customs, and receive an entry number for them. So, then they give us this number and send us a document stating what their number is and the number that [85] we stencil on each one of our bales as we unload.

Q. I would like to hand you this document and see if you can identify it, please.

A. Yes, sir. This is our 7502-A Form, that we use. It is the permit to enter the tobacco in our warehouses. It's called a warehouse entry permit that has the tobacco and the amount on it that we received on this particular shipment.

Q. So, would that be an example of the Form 7502 that is used in the process of warehousing the imported tobacco we have been discussing?

A. Yes, sir. It would. It has the entry number at the top that we stencil on each bale.

* * * *

[86] Q. Now, Mr. Sapp, we have been indicating, or Mr. Price has indicated that the document that you have before you, which has just been marked Appellant's Exhibit Nine as for illustrative purposes only, is it a document of the kind before you prepared for each shipment?

A. It is.

Q. Of the tobacco that comes into the Customs Bonded Warehouses under your supervision?

A. It is.

Q. Where does that document originate?

A. It originates in our tobacco comptroller's department.

Q. And how does that document relate to the manifest [87] that you received?

A. The same information that's on this is on the manifest.

Q. Is that an official Customs Department form?

A. Yes, sir. It is.

* * * *

Q. To your knowledge is it required by law that such a document be maintained by law for shipments in Customs Bond?

MR. PRICE: Objection.

A. Yes, sir. As far as I know it is.

[88] BY MR. KUMMER:

Q. And what does the document permit to happen to the tobacco?

* * * *

[89] A. This form is required for us to have it before we can enter this tobacco in our storage bonded warehouses.

BY MR. KUMMER:

Q. To your knowledge, from the time that the tobacco that was, that is an issue in this proceeding, is off loaded



on the ship to the time that it reached the Customs Bonded facilities under your supervision, it was continuously in Customs Bond?

A. In Customs Bond, yes, sir.

Q. Once the tobacco is off loaded, how is it stored in the facilities under your supervision?

A. It's stored on pallets. Most of our storage sheds are either one story or two story. Some of them have racks. It's all throwed into the cars, the pallets are put in our racks on our floor, our bays are marked and lettered as to the types and grades. This is the way it's stored in our bonded warehouse.

Q. Is there any separation of the tobacco with respect to the time that it entered the warehouse from [90] the ship on which it came?

A. About separation? What do you mean by separation?

Q. As to lots or the time in which it entered the warehouse?

A. Yes. Whenever the tobacco comes in, you usually have different types of grades. Usually one grade will come at a time. You receive one grade, you will enter it into your bays and market [sic] it. That tobacco is physically counted as it comes out of the boxcars and also counted after we get it in our warehouses.

Q. As part of this warehousing activity do you or those under your supervision maintain records?

A. Yes, sir.

Q. From time to time?

A. (Nods head)

Q. Would you describe the records that are maintained with respect to the imported tobacco that's stored in the Customs Bonded Warehouse?

A. Well, our records are maintained for the fact that we continuously keep records. We get a manifest or a classification. We get a classification from our tobacco comptroller's people stating how much tobacco is in this shipment. The shipment of the tobacco consists of maybe

more than one grade, but it's all on that [91] one ship. It will be what is under this one entry number. We take that classification and use it as we unload our cars. We document the car numbers. We take the manifest. The manifest shows how many bales is supposed to be in that car. We certify that amount of bales, what is in that car. We unload it. Place it in our warehouses, enter it into our records at our office, how many bales was in there, and how much was in that entry on that given date, and this is continued all the way through until we complete that entry as we unload it.

Q. I would like to hand you this document and see if you can identify it, please.

A. Yes, sir. This is our 7505 Form that we use. It permits us to withdraw tobacco for consumption. Whenever we have to enter this tobacco to our blending rooms, whenever they order it, we have to have this form in order to permit us to withdraw it from the bonded warehouse.

Q. Where does this form go?

A. It goes, it goes in the Customs file. We have a Customs file there at Whitaker Park that we maintain. We maintain all the records that occur in any entry that comes under for Customs purposes. Anything that takes place with any entry that comes in have to be, Customs [92] tobacco, there is a file in every piece of material that we get, has to go in that file. When this tobacco is exhausted, the tobacco that goes into the blending rooms to be used, all that file is exhausted and delivered to the local Customs Office.

* * * *

[94] Q. Now, you have just stated that this form is executed at the time that the tobacco is withdrawn from the Customs Bonded Warehouse. Would a similar document be executed for each withdrawal from a Customs Bonded Warehouse?

A. Yes, sir.



Q. That would include a withdrawal of any of the tobacco that is in issue in this case?

A. Right.

Q. The same would be true on the Form 7502 that was previously introduced?

A. (Nods head)

Q. A form similar to that which was introduced into evidence would be executed for each entry of tobacco into the Customs Bonded Warehouse?

A. (Nods head)

Q. And such a form was in fact executed for the entry of all tobacco that is in issue in this case?

A. Yes, sir.

Q. Now, what happens to the tobacco once the Form 7505 is executed, and what happens to the tobacco then? [95] A. The tobacco is transported from our storage facilities to the blending rooms.

Q. Does anything happen to it at that time?

A. As it is delivered to our blending rooms, it is weighed and duty is paid on it, after it is weighed.

Q. Now, the location where the tobacco is weighed, as you have just testified, is that a classification of Customs Bonded Warehouse or Customs Bonded area?

A. Yes, sir. That's a Class Two Warehouse, because of the fact that's where they do the weighing.

Q. So, what would you say the purpose of the Class Two Warehouse would be?

A. That's where the duty is paid.

Q. All right.

A. The Class Two is the weighing and certifying the correct count for duty to be paid on it.

* * * *

[96] Q. Does United States Customs exert any control over Customs Bonded Warehouses under your supervision, or the contents thereof?

* * * *

A. Yes, sir.

BY MR. KUMMER:

Q. Can you state what controls the United States Customs exerts over the warehouses, the Customs Bonded Warehouses, and the contents thereof under your supervision?

A. They have their auditors to come up and look at our records. They spot check us. They check our facilities to see that our markings are right; to see that our entry numbers are stencilled on the bills [sic].

[97] Q. All right.

A. And they also check our records from the files that we keep for them for Customs purposes. They go through them, all our books.

* * * *

Q. Does the United States Customs receive copies of the Forms 7505 and 7502 that have been introduced here?

A. Yes, sir. They receive it when this file goes into Customs, after the whole entry number has been exhausted. Everything has taken place with this tobacco, and it is taken to Customs.

Q. Is there ever a reconciliation of the information transmitted to the United States Customs with the books [98] and records. maintained at the Customs Bonded Warehouse?

A. Yes. They come out and look at them, and they make sure that our records are right.

Q. Do they make a comparison between the records that have been received and maintained and the physical property within the warehouses?

A. Yes, sir.

Q. You mentioned spot checks a minute ago. I wonder if you would state what you mean by that term?

A. Well, spot checks is where they pick out certain entries of tobaccos in a warehouse, and physically count it, and when they do these spot checks, you never know when they are going to do it or what entry numbers



they are are going to spot check. We don't know when they are coming. We don't have any idea when it's going to be done.

* * * *

[99] Q. To your knowledge, can stored tobacco be destroyed while in Customs Bonded Warehouse?

A. Yes, sir.

Q. And is duty paid on that tobacco?

A. No, sir.

Q. All right.

A. Any of the tobacco that's destroyed, duty is not paid on it.

* * * *

[101] Q. Mr. Sapp, do you know the amount of duty paid [102] or to be paid on the imported tobacco in Customs Bonded Warehouses in Durham and Forsyth Counties as of January 1, 1983?

A. Forsyth County, it's about thirty-five to forty million, I understand. And I believe in Durham it was about seven or eight million.

* * * *

[102] CROSS-EXAMINATION BY MR. KITCHEN:

* * * *

[103] Q. When is that bond given?

A. Well, I think as far as I know, R J. Reynolds Tobacco Company has a guaranteed bond of all tobacco that is imported in.

Q. When—

[104] A. (Interposing) One bond, but different entries.

Q. When does that tobacco come under bond?

A. It comes under bond when it comes off the ship. It's under bond, and it stays under Customs control, but a number is not attached to it as far as storage goes until it gets to our storage areas. Now, the entry numbers that come in with it from the ship and from the railroad has a number on it. Now, I don't know whether

you call this a bond number. This is a number that is attached to each article that comes in. But I don't know whether you would call this a bond number or an entry number. I know the manifest has a number which is an in transit guaranteed number.

Q. And this bond that is given, isn't it true that it is given to insure the payment of the Customs Duty to the United States Government?

A. Yes, sir.

Q. And the separation that takes place in the warehouse that you testified to, the physical separation, that's also to insure that the Customs Duty is paid, is not that true?

A. Yes, sir.

* * * *

[108] Q. And this tobacco, this Turkish Tobacco testified to earlier referred to that requires aging, does it not, before it can be used?

A. That's hard to say. Really, it don't have to be aged because of the fact that a lot of your tobaccos you get in is already old tobacco when it gets here. It's already aged.

Q. But tobacco is required to be aged, is that correct?

A. Normally, it will stay here, I will say two years, and be aged before we use it, but there is some old crop tobacco that does come in that is already aged.

Q. So, any tobacco that is not what you refer to as old crop tobacco would be required to be aged before it is used, and their tobacco is the tobacco in the Durham County Warehouses?

A. It don't have to be. Normally the tobacco is aged, but it does not have to be aged in order for us to use it.

Q. Is your testimony you may use green tobacco?

MR. KUMMER: Objection.

MR. KITCHEN: Apparently that's what he is [109] saying.

MR. KUMMER: I don't think that is responsive or fair to the witness.



It is not related to the question presented.

VICE-CHAIRMAN LEATHERMAN: If he dosen't know he certainly can express himself.

Overruled.

A. The tobacco when it comes in sometimes this type of what we call Turkish Tobacco, it has to go through what we call a fermentation stage after it gets here. This is what we call our aging process. Some of the time these countries will, what they call pull an artificial fermentation. They will make it sweat while it is still green. If this is done, then our people would probably want us to use it right after it gets in here.

BY MR. KITCHEN:

Q. So, this would be in lieu of the normal aging process to be done?

A. Yes, sir.

Q. But you would say that normally the tobacco when it comes into Durham, it's required to be aged before it's used, if it does not undergo this treatment?

A. Normally it would be aged. Right.

* * * *

[114] Q. Does the tobacco in Durham County receive police and fire protection from the County and City of Durham?

A. Yes, sir. I am sure it does.

* * * *

[115] Q. Isn't it true that this tobacco in Class Eight Warehouse may be manipulated?

A. Yes, sir.

Q. And by manipulation, are any of the, or in the manipulation process you may repack this tobacco in order to make it stack better, for instance?

A. Yes, sir.

Q. And you in fact do that in Durham County, do you not?

A. If we have tobacco that gets damaged, yes, we do.

Q. Tobacco that is not damaged, though, is repacked

at certain times, is it not, so that it may be stacked better because of the unwieldy nature of the bales?

A. No, sir.

Q. You never repack tobacco that's not damaged?

A. Yeah. We repack it in its shape of its original shape. We repack it in the type of container that it is or either reuse the type of container that it's in and take out the damaged portion.

Q. And then, strike that. The tobacco in the same container is manipulated so that this container will stack better, is that correct?

[116] A. No. We don't manipulate anything for the bales to stack better.

Q. Isn't it true that you have found in Durham that the bales of tobacco have a tendency to fall over over a period of time if they are stacked too high?

A. All Turkish Tobacco has a tendency to fall over. I don't believe you could stack it straight if you only stacked it too high.

Q. Isn't it true that the Turkish Tobacco comes in different sized bales?

A. Yes, sir.

Q. And that some bales are smaller than others?

A. Yes, sir.

Q. And I believe the bales that come from Syria are of the size that are the smaller type bales?

A. Yes, sir.

Q. And the bales that come from other countries, such as Turkey, I believe come in larger bales?

A. Yes, sir.

Q. Isn't it true in Durham you are currently, when you would move this tobacco, restacking it and changing it around where it will be easier for you to handle?

A. Well, not necessarily easier for us to handle. It's a process of what we call turning our tobacco. [117] We have a process in the summertime, especially, whether the tobacco is falling or not falling, we have a process of where we turn our tobaccos at intervals in the summer-



time, in order to keep it from heating up or causing any problem of damage to keep from having damage.

* * * *

CROSS-EXAMINATION BY MR. PRICE:

Q. Mr. Sapp, we used the phrase we have used, the phrase in the proceeding, bonded warehouses, but I believe you have testified what we are referring to is a bond which R. J. Reynolds Tobacco Company insures payment of the import duty to the Federal Government, is that correct?

A. Yes, sir.

* * * *

[120] Q. The question was, you have physical custody of this tobacco on behalf of your employer, R. J. Reynolds Tobacco Company, don't you?

A. Yes. I have custody over the tobacco.

Q. Physical custody?

A. Physical custody.

* * * *

[123]. Q. These forms are filled out by R. J. Reynolds Tobacco Company and then they are kept in R. J. Reynolds Tobacco Company's files?

A. They are kept on R. J. Reynolds Tobacco Company's property, but they are Customs Files.

Q. Where are the files kept?

A. Well, at Whitaker Park they are kept in our office there on the compound. At Kernersville they are kept on the facilities there.

Q. Who is in these offices?

A. Well, we have in the Whitaker Park compound, we have a girl that does all this information and keeps all these records for Customs.

Q. She keeps the records?

A. She keeps the records. We do the same things that Customs used to do.

Q. She is an employee of?

A. She is an employee of Reynolds.

Q. Mr. Sapp, let me ask you one more time, do these [124] records belong to R. J. Reynolds Tobacco Company?

* * * *

A. (Interposing) I'm going to have to say again that the records are maintained on Reynolds' property, but they are Customs' records. Customs can come and take them out of our files anytime they want to, and when we exhaust any bond or entry we have used, when we exhaust it Customs takes that file with them. It is really their records. It is not Reynolds'.

BY MR. PRICE:

Q. They take these files physically out of your office? [125] A. No. They don't take them physically. We transport them like at Whitaker Park, we transport them to the Customs Office downtown. We physically take them to them when that is exhausted.

Q. When that duty is paid?

A. That's right. When that entry number is exhausted.

Q. On this 7505 Form, Exhibit Ten, Mr. Sapp?

A. Yes, sir.

* * * *

[126] Q. Yes, sir. With regard to this imported tobacco, to be more specific, R. J. Reynolds Tobacco Company would maintain records of what they owned as far as imported tobacco, whether or not it was in Customs or not, wouldn't they?

A. Sure, they would maintain records.

* * * *

[127] Q. If you can and know, between January first of Eighty-three and today's date, October twenty-seventh of Eighty-three, how many such officials, Customs Officials have been on premises to make such checks?



A. We have had one out of Wilmington twice, and one out of Miami once, that I know of. That is at Whitaker Park.

[128] Q. That's one out of?

A. Miami.

Q. And how many out of Wilmington?

A. The same man came from Wilmington twice.

Q. So, three times?

A. Three times.

Q. Between January first of Eighty-three and the present date?

A. (Nods head). That I can remember, right off the top of my head.

Q. Mr. Sapp, of this imported tobacco, which is the subject of this proceeding, how much of it has been destroyed since it was placed in these Customs Warehouses?

A. Destroyed, you mean by damage?

Q. Destroyed?

A. I have no idea how much has been destroyed.

Q. Has any of it been destroyed, to your knowledge?

A. We have some damaged that we have to destroy periodically. Yes, sir.

Q. Can you express in pounds?

A. No, sir. I can't. I have no details exactly how many pounds we have destroyed.

Q. When was this destruction performed?

A. Well, we usually, we are working damage anytime that we find it. If you find a leak in a warehouse, [129] and you have to go in there and cut your bales out, you have to work your bailage and cut it out, or you are going to lose more. When you find your damage, you work it. There is no certain time we work this damage.

Q. How often does that occur?

A. That's hard to say.

* * * *

[130] Q. Mr. Sapp, not much at all is destroyed, is it?

MR. KUMMER: Objection, Your Honor.

BY MR. PRICE:

Q. In terms of the total amount that you are responsible for?

VICE-CHAIRMAN LEATHERMAN: I will overrule that and let him answer it, if he knows.

A. There is not a large amount that's destroyed. No, sir.

* * * *

[131] Q. How much import duties had been paid on the tobacco which is the subject of this case, Federal Government duties?

A. From the information that I have seen, thirty-five to forty million.

Q. Do you know how much has been paid to date, so far, on this tobacco?

A. (No response)

Q. In Federal Import Duties?

A. I don't keep up with that, but I did see it on a memo, it seemed like, at Whitaker Park, was about, or Forsyth County, was like ten million dollars had been paid up through like September.

Q. Do you know how much will be paid between then and, that is, September, and the end of this calendar [132] year?

A. It seems like on that memo it was something over three million dollars, probably we will pay yet, between September and the end of the year.

* * * *

[133] Q. Thank you. Mr. Sapp, did you testify that this imported tobacco, I don't know, normally is held two years in this storage before it is used?

A. Well, that goes back to like the question I gave the man from Durham. You know, normally it will be held two, in storage two years, but there are cases it will not be. It don't have to be held two years.

Q. Well, why is it held for two years in storage before it is used?



A. Well, normally we use our oldest crop first, so your oldest tobacco will be used out all the time. That lets you have less chance of having that tobacco to spoil on you.

Q. Well, so, do you use what's entered the warehouse first in manufacturing, is that right?

A. (No response)

Q. The oldest you have?

A. (Nods head)

Q. That you have had the longest, that you have owned the longest?

A. Yes, sir.

Q. Is it kept for any other purpose?

[134] A. Well, the aging process does have something to do with the flavor of the tobacco, but still it does not have to. We can use it ahead of time.

* * * *

Q. Normally this tobacco is held two years before it is used?

A. Normally it will be.

Q. And it's held two years in these warehouses?

A. Yes, sir.

Q. Why is it held again for this two-year period, [135] normally?

A. (No response)

Q. In Forsyth County? We are referring to Forsyth.

A. Well, it can be for aging, say it is for an aging process. You can say it's because we want to use the oldest crop first.

Q. And when you hold it, you are talking about holding it in a storage facility, storage warehouse?

A. Keeping it in a bonded warehouse.

Q. It doesn't have to be in a bonded warehouse, does it, for that purpose?

* * * *

[136] Q. The question was for this normal two-year period that it's kept in storage it could just as well be

kept in any storage house at R. J. Reynolds Tobacco Company and not a Customs Bonded Warehouse?

* * * *

A. As long as the government has got control over this tobacco, it would have to be in a Customs Warehouse.

BY MR. PRICE:

Q. It's not the question. The question is for this purpose of aging or storing this tobacco before it's used, could it just as well be stored in a warehouse of R. J. Reynolds Tobacco Company's which is not a Customs Warehouse, as far as it's need for the manufacturer?

A. Yes, sir.

Q. Mr. Sapp, in terms of the use of the subject [137] and imported tobacco for manufacturing tobacco products in Forsyth County, does the Customs Bonding requirement interfere with your business processing of this tobacco?

MR. KUMMER: Objection, Your Honor.

That's calling for a conclusion of the witness.

VICE-CHAIRMAN LEATHERMAN: Repeat that question, please, or have it read back.

(The last question was read.)

VICE-CHAIRMAN LEATHERMAN: Overruled.

A. Not that I know of.

* * * *

Q. Would you repeat for me, Mr. Sapp, the types of functions that are performed on this imported tobacco in a Class Eight Warehouse?

MR. KUMMER: Your Honor, it seems to me we [138] are starting on the same road we have been on many, many occasions today.

VICE-CHAIRMAN LEATHERMAN: I agree with you.

I am going to let him answer the question.

A. The functions that take place into a bonded warehouse?



BY MR. PRICE:

Q. In Forsyth County?

MR. PRICE: Mr. Chairman, everything I ask is in relation to Forsyth County, I hope.

I didn't make that clear, and I apologize if the witness's answers do relate to Forsyth County.

VICE-CHAIRMAN LEATHERMAN: This is why I am permitting it.

A. The things that go on at a warehouse, if the tobacco heats up on you, you will have to go in and turn it. We call it a turning process, flipping it over. We have to work the damaged or take it out. It has to be removed from one warehouse to another for reasons that if your space is one someplace and not another, you have to move to another space. It's a process just about of moving or turning or rearranging out tobaccos all the time.

[139] BY MR. PRICE:

Q. Mr. Sapp, if you know, is the only reason R. J. Reynolds Tobacco Company stores this tobacco in Customs Bonded Warehouse to defer payment of the Federal Import Duties?

MR. KUMMER: Objection, Your Honor?

VICE-CHAIRMAN LEATHERMAN: Objection overruled.

I will let him answer, if he knows.

A. Sir, I don't know.

BY MR. PRICE:

Q. Let me put it this way, Mr. Sapp:

Can you think of any other reason that it's held by R. J. Reynolds Tobacco Company in Customs Bonded Warehouse?

A. No, sir.

* * * *

[142] BY MR. TURNER [Member of the Board]:

Q. Do the Customs Officers have access to the warehouse twenty-four hours a day, if they want to get in?

A. Yes, sir.

Q. Why is Durham County used as a storage area? Just historical precedent? It seems like it would be better to leave them in Miami or Wilmington, for example. Why is Durham County used as a storage area, rather than somewhere else?

A. For R. J. Reynolds Tobacco Company?

Q. Yes.

A. At that time it happened, we needed warehouses, and R. J. Reynolds Tobacco Company purchased warehouses in Durham.

Q. When did the Customs people stop maintaining the records? I assume from your testimony sometime they did maintain them but now they do not?

A. (Nods head)

Q. How long ago, and why?

A. December of 1982.

Q. Why?

A. Really I don't know why. The government just all of a sudden decided they were going to pull out and turn all the records over to proprietors, and this for [143] us to keep up with them, and this happened on a few weeks' notice.

Q. What is damaged tobacco? Is it mildewed tobacco? Is it a torn bale? What is that?

A. No. Damaged tobacco, what we are referring to here is tobacco that has spoiled or rotted.

Q. Okay.

A. And that we have to go in there and cut that tobacco out. It can't be used in our blending rooms.

Q. Which is usually caused by moisture?

A. Well, it could be caused by moisture. It could be caused by leaking roof. It could be caused by getting wet in a boxcar. Numerous things.

* * * *



## TESTIMONY OF S. BRUCE MANGUM, DURHAM COUNTY TAX SUPERVISOR

[147] DIRECT EXAMINATION BY MR. KITCHEN:

* * * *

[148] Q. What is the rate of tax charged in Durham County?

A. One dollar, fourteen cents per hundred. City is in addition to that.

Q. How much is the city tax?

A. Ninety-four cents per hundred.

Q. Are these rates the same for this imported tobacco as for other personal property?

A. Yes.

Q. Does the County or the City to your knowledge make any kind of differentiation as to the services provided as to this imported tobacco as opposed to other property in the city or county?

A. There is no difference. It's all the same.

Q. Could you tell us, you say there is no difference, so could you tell us whether or not then there would be police and fire protection as well as other services to this tobacco?

A. Yes. They would receive the same services that other property owners in Durham County or the City would receive, and this would include police, fire, and garbage collection.

Q. And would you tell us whether or not there is any other tobacco stored at the warehousing facility [149] in Durham County that belongs to R. J. Reynolds Tobacco Company besides this imported tobacco?

A. There is.

Q. And is tax paid on this tobacco?

A. Yes.

* * * *

CROSS-EXAMINATION BY MR. SKINNER:

Q. Mr. Mangum, in reference to the property tax assessed by Durham County, do you know if property taxes

are assessed at the full rate on the actual warehouse facility and the real property underlying those facilities that are in question, the Customs Bonded Warehouses themselves?

A. Would you repeat that?

Q. Are property taxes paid on the warehouse facilities themselves?

[150] A. Yes.

Q. And those are at the full rate charged by the City and County of Durham?

A. That's correct.

Q. One other point of clarification, if I may, if this is within your knowledge: The taxes paid on other tobacco that is stored in that facility that you referenced, that is not imported tobacco, that is not duty paid, that is stored in a Customs Bonded Warehouse, these are non bonded warehouse tobaccos we are talking about?

A. Yes.

* * * *



**TESTIMONY OF W. HARVEY PARDUE,**
**FORSYTH COUNTY TAX SUPERVISOR/COLLECTOR**

[159] DIRECT EXAMINATION BY MR. MAXWELL:

Q. Would you state your name for the record, please.

A. Yes. My name is William Harvey Pardue.

Q. And where are you employed, and in what capacity?

A. Forsyth County Tax Supervisor-Collector.

Q. Okay. Would you briefly describe your duties, please, for the Board?

A. Yes. My responsibilities include the listing, appraising, the billing and the collection of all property subject to taxation within the county.

Q. Does that include Winston-Salem and Kernersville?

A. It includes all the municipalities within Forsyth County.

Q. And how long have you been the Tax Supervisor?

A. I have been Tax Supervisor since July of 1971. I have been the collector since July of 1982.

Q. And you now are in both capacities?

A. Yes, I am.

Q. You saw the listing admitted into evidence, which shows [160] the value of the subject imports, valued for 1983 as shown on the listings for Forsyth County as $432,488,848.00?

A. Yes, sir.

Q. And for Winston-Salem, $184,773.00—excuse me—$184,773,440.00?

A. That is correct.

Q. And for Kernersville, $247,675,428.00?

A. That is correct.

Q. Okay. Would you tell the Commission what the tax rate for Forsyth County for 1983 is, please?

A. The 1983 tax rate for Forsyth County was seventy-nine cents per hundred dollars' valuation.

Q. And what was that rate for the City of Winston-Salem?

A. The rate was seventy-two cents per one hundred.

Q. And how about the rate for the Town of Kernersville?

A. The rate for the Town of Kernersville was fifty-five cents per hundred.

Q. Okay. So, what was the amount of the actual tax at issue for 1983 for Forsyth County?

A. Approximately $3,416,000.00.

Q. Okay. And for the City of Winston-Salem?

A. Approximately $1,330,000.00.

Q. And for the Town of Kernersville?

[161] A. Approximately $1,360,000.00.

Q. And what is the approximate total in all three governmental units?

A. Approximately six million dollars.

Q. For 1983?

A. For 1983. Yes.

* * * *

[162] BY MR. MAXWELL:

Q. Okay. What percentage is the value of the subject imported tobacco of the value of all of R. J. Reynolds Tobacco Company's real and personal property listed in Forsyth County for 1983?

A. Forty-two percent.

Q. Okay. Does this imported tobacco receive the [163] same fire, police and other services received by other systems in Forsyth County?

A. Yes, sir. It does.

Q. Mr. Pardue, is this property tax assessed at a higher rate if property is imported, or is it the same as all other property?

A. It is the same as all other property.

Q. Are you saying it's a nondiscriminatory tax?

A. That's correct.

Q. How long has this type of imported tobacco been coming to Forsyth County?



A. For as long as I have known anything about R. J. Reynolds Tobacco Company, which is a number of years.

Q. About how many years?

A. At least twenty-five.

Q. And why is this imported tobacco brought to Forsyth County?

A. Tobacco used in the manufacturing process in Forsyth County.

Q. And where does this property come from?

* * * *

[164] A. It's reported to me that it comes from a number of European countries. Bulgaria, Yugoslavia, Lebanon. From South American countries as well.

BY MR. MAXWELL:

Q. Turkey in there as well?

A. Yes. Turkey is one of the providers.

* * * *

[166] Q. What were you told by these officials?

A. It has been stated here in this room today on two occasions, one is that it was there to defer the payment of duty. Another statement was that it's placed in those warehouses for the purpose of—

VICE CHAIRMAN LEATHERMAN: (Interposing) Objection overruled.

Go ahead with it.

A. That the tobacco is placed in the United States Customs Bonded Warehouses to take advantage of the benefits provided it through the Customs bonded process.

* * * *

[167] BY MR. MAXWELL (to the witness):

Q. Now, Mr. Pardue, who owns these warehouses?

A. R. J. Reynolds Tobacco Company.

Q. And who built the warehouse?

A. R. J. Reynolds Tobacco Company

Q. Have you ever seen any Customs officers at one?

* * * *

A. I have not seen any there.

Q. Are the warehouses locked?

A. They are not.

Q. How are they different in appearance or construction from any other tobacco storage warehouse?

A. There is no apparent difference at all.

Q. When the tobacco needs to be removed from the bond and payment of duty and to manufacturing purposes, who does that function?

A. R. J. Reynolds Tobacco Company.

* * * *

[176] Q. What was the purpose of our visit out there?

A. Our purpose for going to that particular facility was to see what happened to the tobacco once it left the storage warehouse to see where it went to, to see how it was weighed, how it was accounted for, how far it was kept separate from any other domestic tobacco that may be being received at the same time; that the paper work was accomplished at that point, and there was a receiving area once it passed the scales that would be a receiving area, which would be a temporary storage again until it was blended at that point or commenced the blending process with other domestic tobacco and goes in the manufacturing process.

Q. So, what happens in the removal from that Class Two area in payment of duty? What happens next?

A. It's moved across a mark on the floor, actually, and it's now out of Customs Bond, and free to be moved into the manufacturing process.

Q. And when does that manufacturing process begin?

A. I believe it can begin within three to four days from the time it enters the door.

Q. Okay. How long after it is removed from bond until it actually becomes the finished product?



A. Probably seven to ten days.

[177] Q. And how long after it is manufactured into finished product before the finished products themselves are shipped by R. J. Reynolds Tobacco Company?

A. Some are shipped the day they are manufactured. The others may vary.

Q. To summarize, about how much time elapses between the time R. J. Reynolds Tobacco Company takes it out of bond and the finished product is shipped to R. J. Reynolds Tobacco Company's markets?

A. Probably a span of two weeks.

Q. Is domestic tobacco stored in Forsyth County subject to property tax?

A. It is.

* * * *

CROSS-EXAMINATION BY MR. KUMMER:

Q. Mr. Pardue, are the warehouses, the Customs Bonded Warehouse themselves and the ground upon which [178] they are located subject to taxation by Forsyth County?

A. Yes indeed.

Q. How many times have you been to R. J. Reynolds Tobacco Company's facilities to see the process you just described?

A. This is the only, or that was the only time I think that I was ever in a Customs Warehouse, to my knowledge. I have been to the facility a number of times. We could have been in a Customs area, but I may not have been aware of it.

Q. So, in order for you to observe a Customs Official on one occasion one day, you would have had to run into him in order for you to observe a Customs Official on the premises?

A. That's correct.

* * * *

## NOTICE OF APPEAL AND EXCEPTIONS OF R. J. REYNOLDS TOBACCO COMPANY FILED JANUARY 13, 1984, NORTH CAROLINA PROPERTY TAX COMMISSION

[Title omitted in printing]

This matter came on to be heard, and was heard, by the Property Tax Commission (the "Commission") sitting as a Board of Equalization and Review on October 27, 1983, pursuant to the Appeal of R. J. Reynolds Tobacco Company ("Appellant") from denials of it claims for immunity or exemption by the Durham County Board of Equalization and Review and the Forsyth County Board of Equalization and Review for 1983. Appellant timely applied for immunity or exemption from property taxation for leaf tobacco stored in United States Customs bonded warehouses physically located in Durham and Forsyth Counties as of January 1, 1983. By Final Decision rendered December 14, 1983, (the "Commission's Final Decision") the Commission upheld the denial of Appellant's claims by the Durham County Board of Equalization and Review and the Forsyth County Board of Equalization and Review.

Appellant hereby gives notice of appeal and sets forth its exceptions pursuant to NC Gen Stat Sec 105-345. Appellant states that the Commission's Final Decision is unlawful, unjust, unreasonable and unwarranted, and sets forth the specific grounds on which Appellant relies for such assertion as follows:

1. The Commission stated the issue to be: "Is the imported tobacco owned by Reynolds and stored in United States Customs bonded warehouses located in Durham and Forsyth Counties excluded from ad valorem taxation by those counties in accordance with the decision of the Supreme Court of the United States in XEROX CORPORATION v COUNTY OF HARRIS, TEXAS, AND CITY OF HOUSTON, TEXAS, —— US —— 103 S Ct 523, 74 L Ed 2d 323 (1982)?" Appellant asserts that the issue presented to the Commission was: "Whether imported tobacco stored in U. S. Customs Service bonded warehouses in Durham County and Forsyth County, North Carolina, on January 1, 1983, is subject to local ad valorem taxation by those jurisdictions?"



2. Appellant takes exception to the Commission's Finding of Fact Number 33 that: "The United States customs office exerts control over the bonded warehouses through auditors and unannounced spot checks." Clear and convincing evidence was presented to the Commission that the United States Customs Office exerts control over the bonded warehouses and their contents in accordance with Title 19, United States Code and Title 19, Code of Federal Regulations, which control is evidenced by audits and spot checks as well as the filing of various U.S. Customs Service forms. Appellant produced clear and convincing evidence that the bonded warehouses and their contents were at all relevant times within the legal control of United States Customs officials in accordance with the provisions of Title 19, United States Code and Title 19, Code of Federal Regulations.

3. Appellant takes exception to the Commission's failure to find as a fact that the tobacco stored in United States Customs bonded warehouses could not legally be commingled with tobacco not subject to Customs bond and was not commingled during any relevant period, thereby disregarding clear and convincing evidence of such fact in the record.

4. Appellant takes exception to the Commission's Finding of Fact Number 49. The record shoes [sic] that one of the reasons Reynolds stores the imported tobacco in Customs bonded warehouses is to defer payments of federal import duties, but there is no basis in the record for a finding that implies that this was the sole reason for storage in Customs bonded warehouses.

5. Appellant takes exception to the Commission's Conclusions, Decision and Order, to the extent that the Commission holds that property held in Customs bond as of 1-1-83 is subject to ad valorem taxation by local jurisdic-

tions if such property is "not destined for foreign markets." Such holding is contrary to the legal principles enunciated by the United States Supreme Court in the XEROX case. There is no distinction in Customs law between goods destined for foreign or domestic markets. Congress has preempted the area of commerce relating to goods in Customs bond, and no jurisdiction can subject such goods to property taxation without violating the Supremacy Clause of the United States Constitution. The United States Supreme Court clearly made no distinction in its holding in the XEROX case concerning the ultimate destination of the goods in Customs bond. There is no basis upon which to make such distinction, and the Commission erred in doing so. Furthermore, the Commission erred in relying upon AMERICAN SMELTING AND REFINING CO. v. THE COUNTY OF CONTRA COSTA, 271 Cal App 2d 437, 77 Cal Rptr 570 (1969), cited by the Commission as a basis for its decision. The instant case is factually distinguishable.

Appellant states that this Notice of Appeal and Exceptions is timely filed in accordance with the provisions of NC GEN STAT Sec 105-345(a). Pursuant to NC GEN STAT Sec 105-345(d) appeal lies to the Court of Appeals as provided in NC GEN STAT Sec 7A-29, and the procedure for appeals is to be in accordance with the Rules Appellate Procedure. Rule 18 of the Rules of Appellate Procedure does not specifically provide for appeals from the Property Tax Commission, although Appellant has been informed by the Clerk of the Court of Appeals that the procedure outlined in Rule 18 is applicable. Appellant respectfully requests a ruling as to the procedure to be followed by Appellant in perfecting the appeal noticed hereby.

Respectfully submitted, this the 12th day of January, 1984.

/s/ Thomas L. Kummer (GR)
THOMAS L. KUMMER
Counsel for Appellant

OF COUNSEL:
Horton, Hendrick & Kummer



**NOTICE OF APPEAL UNDER N.C. GEN. STAT. § 7A-30**
**FILED APRIL 19, 1985,**
**SUPREME COURT OF NORTH CAROLINA**

[Title omitted in printing]

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA

Appellant, R. J. Reynolds Tobacco Company, hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals entered April 8, 1985, pursuant to its opinion filed March 19, 1985, which judgment, as provided in N.C. Gen. Stat. § 7A-30(1), directly involves substantial questions arising under the Constitution of the United States as follows:

Question 1: The above-referenced judgment involves a substantial question arising under the Foreign Commerce Clause, Article I, Section 8, Clause 3, and the Supremacy Clause, Article VI, Clause 2, of the United States Constitution, in that imported leaf tobacco stored by Appellant in United States Customs Bonded Warehouses on the assessment date is immune from ad valorem property tax imposed by Appellees by virtue of the Foreign Commerce Clause and Supremacy Clause. The judgment of the Court of Appeals, by upholding the judgment of the Property Tax Commission, deprives Appellant of immunity from such tax. This constitutional issue was timely raised by Appellant before the Property Tax Commission and preserved by Appellant's exception to the determination of the Property Tax Commission. Exception No. 5 (R pp. 50, 52) This constitutional issue was erroneously determined by the Court of Appeals.

Question 2: The above-referenced judgment directly involves a substantial question arising under the Import-Export Clause, Article I, Section 10, Clause 2, of the United States Constitution, in that imported leaf tobacco stored by Appellant in United States Customs Bonded Warehouses on the assessment date is immune from ad valorem property tax imposed by Appellees by virtue of

the Import-Export Clause. This constitutional issue was timely raised by Appellant before the Property Tax Commission and preserved by Appellant's exception to the determination of the Property Tax Commission. Exception No. 5 (R pp. 50, 52) Exception No. 1 (R pp. 38, 51) This constitutional issue was erroneously determined by the Court of Appeals.

Question 3: The above-referenced judgment directly involves a substantial question arising under the Due Process Clause, Amendment XIV, Section 1, of the United States Constitution, in that imported leaf tobacco stored by Appellant in United States Customs Bonded Warehouses on the assessment date is immune from ad valorem property tax imposed by Appellees by virtue of the Due Process Clause. The judgment of the Court of Appeals, in upholding the determination of the Property Tax Commission, deprives Appellant of immunity from such tax. This constitutional issue was timely raised by Appellant before the Property Tax Commission and preserved by Appellant's exception to the determination of the Court of Appeals. Exception No. 5 (R pp. 50, 52) Exception No. 1 (R pp. 38, 51) This constitutional issue was erroneously determined by the Court of Appeals.

Attached is a certified copy of the opinion of the Court of Appeals.

Respectfully submitted this 18th day of April, 1985.

/s/ Thomas L. Kummer
THOMAS L. KUMMER

/s/ John A. Cocklereece, Jr.
JOHN A. COCKLEREECE, JR.
Attorney for Appellant
R. J. Reynolds Tobacco Company

[Address of counsel and certificate of service omitted in printing.]



## PETITION FOR DISCRETIONARY REVIEW UNDER N.C. GEN. STAT. § 7A-31 FILED APRIL 19, 1985, SUPREME COURT OF NORTH CAROLINA

[Title omitted in printing]

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Appellant, R. J. Reynolds Tobacco Company, respectfully petitions the Supreme Court of North Carolina that the Court certify for discretionary review the judgment of the Court of Appeals entered April 8, 1985, pursuant to its opinion filed March 19, 1985, on the basis that the subject matter of the appeal has significant public interest and the cause involves legal principles of major significance to the jurisprudence of the State. In support of this petition, Appellant shows the following:

### *PROCEDURAL STATEMENT*

Defendant timely filed claims for immunity from ad valorem property tax for certain imported tobacco stored under United States Customs Bond in United States Customs Bonded Warehouses located in Forsyth and Durham Counties, which tobacco was valued at $432,448,868 and $86,610,659, respectively. The Tax Supervisors of Forsyth and Durham Counties denied the claims, which denials were upheld by the Boards of Equalization and Review of Forsyth County and Durham County, respectively. Appellant appealed the denials to the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review. By decision entered December 14, 1983, the Property Tax Commission denied Appellant's claim for immunity. Appellant filed its Notice of Appeal and Exceptions with the North Carolina Court of Appeals on January 13, 1984. On March 19, 1985, the Court of Appeals filed its opinion and on April 8, 1985, judgment was entered denying Appellant's claim for immunity.

## *STATEMENT OF THE FACTS*

Appellant is a New Jersey corporation qualified to do business in the State of North Carolina, with its principal offices and manufacturing facilities in Winston-Salem, North Carolina. Appellant is engaged in Forsyth County, North Carolina, in the business of manufacturing finished tobacco products, which it sells to wholesale distributors and other authorized purchasers in the United States and abroad.

Appellees Durham County and Forsyth County are bodies politic and corporate of the State of North Carolina, possessing the corporate powers specified in N.C. Gen. Stat. § 153A-11 (1973). Appellees, through their Tax Supervisors, are duly authorized by law to administer property tax assessment matters. Forsyth County is duly authorized to administer property tax assessment matters on behalf of the City of Winston-Salem and the Town of Kernersville. Durham County is duly authorized to administer property tax assessment matters on behalf of the City of Durham.

Appellant uses tobacco grown both in the United States and in foreign countries in manufacturing its finished tobacco products. The imported tobacco in issue was shipped to various ports of entry in the United States where it was placed under United States Customs Bond. The imported tobacco was thereafter shipped by Customs Bonded Carrier to United States Customs Bonded Warehouses in both Durham and Forsyth Counties. Pursuant to federal law, the bonded tobacco was segregated from other products not subject to United States Customs Bond and was not commingled with domestic tobacco. All bonded tobacco was clearly marked in accordance with United States Customs Regulations. All aspects of the operation of the United States Customs Bonded Warehouses in which the imported tobacco was stored were in compliance with applicable federal regulations.



The Customs Bonded Warehouses and the land on which they are situated, in both Durham and Forsyth Counties, are owned by Appellant. All property within the Customs Bonded Warehouses is owned by Appellant which is the sole user of the warehouses. Appellant pays all expenses of maintaining and supervising the Customs Bonded Warehouses and the imported tobacco which is stored therein.

Federal law provides that the tobacco may be stored duty free for five years, at which time the duty must be paid or the tobacco reexported. Tobacco imported by Appellant is normally held in storage approximately two years before it is used in the manufacturing process. Appellant withdraws the imported tobacco from United States Customs Bond upon execution and submission of documentation to the United States Customs Service. Upon withdrawal the duty is then paid. The imported tobacco is thereupon blended with domestically grown tobacco in the manufacturing operations of Reynolds.

The Customs Bonded Warehouses, *i.e.*, the buildings and land in which the imported tobacco stored under United States Customs Bond is located, are subject to property taxation by Forsyth and Durham Counties, as well as their affected municipalities.

## *REASONS WHY CERTIFICATION SHOULD ISSUE*

Appellant contends that the tobacco in issue is immune from ad valorem property tax by Forsyth and Durham Counties and their affected municipalities. Appellant bases its claim for immunity on the following:

The imposition of ad valorem property tax by Forsyth and Durham Counties on imported tobacco subject to U.S. Customs Bond and stored by Appellant in United States Customs Bonded Warehouses is unconstitutional. First, the imposition of the property tax on the bonded tobacco violates the Commerce Clause, Article I, Section

8, Clause 3, and the Supremacy Clause, Article VI, Clause 2, of the United States Constitution. Under the Commerce Clause, Congress has the power to regulate foreign commerce. Pursuant to the power, Congress enacted 19 U.S.C.A. §§ 1555-1565 (1980), setting up a comprehensive system of U.S. Customs Bonded Warehouses. This Congressional action is pervasive and preempts state taxation of property stored in United States Customs Bonded Warehouses. The U.S. Supreme Court so held in *Xerox Corp. v. County of Harris*, 459 U.S. 145, 103 S.Ct. 523, 74 L.Ed.2d 323 (1982).

Second, the imposition of property tax on the bonded tobacco is prohibited by the Import-Export Clause, Article I, Section 10, Clause 2, of the United States Constitution. Imposition of a nondiscriminatory ad valorem property tax on goods still in the import stream of commerce is prohibited. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 538, 46 L.Ed.2d 495 (1976).

Finally, the imposition of property tax on the bonded tobacco is violative of the due process under Amendment XIV, Section 1 of the United States Constitution. Tobacco stored in U.S. Customs Bonded Warehouses is not within the "customs territory" of the United States, and by definition, thereby not within the jurisdiction of Forsyth and Durham Counties. Due process prohibits the taxation of property not within the jurisdiction of the taxing power. *Billings Transfer Corp. v. County of Davidson*, 276 N.C. 19, 170 S.E.2d 873 (1969).

The subject matter of the appeal has significant public interest due to its impact on the administration of the ad valorem property tax system in the State. The value of the property in issue and the determination as to its immunity from ad valorem property tax substantially affects not only the fiscal condition of the parties in issue, but also similarly situated parties throughout the State. The funding of public services, of which ad valorem property taxes are a major source, is of significant public interest. Furthermore, the use of the ports and warehouse facilities of the State are of significant public interest, which interest will be adversely affected by the decision of the Court of Appeals.



The subject matter of the appeal involves legal principles of major significance to the jurisprudence of the State in that the decision of the Court of Appeals, in upholding the decision of the Property Tax Commission, conflicts with recent decisions of the United States Supreme Court and deprives Appellant of the rights guaranteed to it by the United States Constitution.

Attached to this petition is a certificate of service evidencing service on the opposing parties and a clear copy of the opinion of the Court of Appeals.

Respectfully submitted the 18th day of April, 1985.

/s/ Thomas L. Kummer
THOMAS L. KUMMER

/s/ John A. Cocklereece, Jr.
JOHN A. COCKLEREECE, JR.
Attorney for Appellant
R. J. Reynolds Tobacco Company

[Address of counsel and Certificate of Service omitted in printing.]

**MOTION OF FORSYTH COUNTY AND ITS AFFECTED MUNICIPALITIES TO DISMISS APPEAL FILED APRIL 29, 1985, SUPREME COURT OF NORTH CAROLINA**

[Title omitted in printing]

TO THE HONORABLE SUPREME COURT
OF NORTH CAROLINA:

Pursuant to App.R. 37, Forsyth County and its affected municipalities hereby move to dismiss the Notice of Appeal filed herein dated 18 April 1985, on the grounds that the appeal does not directly involve substantial questions arising under the Constitution of the United States or of this State, and shows the Court as follows:

*Question 1*: Appellant contends that the property taxes at issue are invalid because they are preempted by federal tariff legislation enacted pursuant to the Foreign Commerce Clause and Supremacy Clause of the United States Constitution. This was the sole basis of its appeal to the Property Tax Commission. (R p 3). This argument was squarely and correctly decided against appellant by the Court of Appeals in its opinion at pages 9 through 15. Significantly, no case has held that tobacco stored in customs bond for domestic use is exempt from nondiscriminatory ad valorem taxation. To the contrary, the United States Supreme Court has dismissed an appeal for want of a substantial constitutional question (396 U.S. 273, 90 S. Ct. 533, 24 L. Ed. 2d 462) and denied rehearing (397 U.S. 958, 90 S. Ct. 940, 25 L. Ed. 2d 144) on a state court ruling squarely holding that such property is not exempt from ad valorem taxation. *American Smelting and Refining Company* v. *County of Contra Costa*, 271 Cal. App.2d 437, 77 Cal. Rptr. 570 (1969). A dismissal by the United States Supreme Court for want of a substantial constitutional question "is a disposition on the merits." *Hicks* v. *Miranda*, 422 U.S. 332, ——, 95 S. Ct. 2281 at 2289, 45 L. Ed. 2d 223, —— (1975).



*Question 2*: Appellant alleges a substantial constitutional question arising under the Import-Export Clause of the Constitution. This constitutional argument was not raised before the Property Tax Commission. Rather, the only grounds for appeal to the Property Tax Commission was the ruling in *Xerox Corporation* v. *County of Harris and City of Houston*, 459 U.S. 145, 103 S. Ct. 523, 74 L. Ed. 2d 323 (1982), a case decided on the basis of the Foreign Commerce Clause and Supremacy Clause of the United States Constitution. The Property Tax Commission made no ruling on this issue, and properly so since G.S. 105-345.2(c) provides that "the appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in the notice of appeal filed with the Commission." *Accord*, *State* v. *Cumber*, 280 N.C. 127, 185 S.E. 2d 141 (1971), holding that appellate courts will not pass upon constitutional questions not raised and passed upon in the trial tribunal.

Notwithstanding, the Court of Appeals addressed and held against appellant's argument in this regard in its opinion at pages 6 through 9, citing ample recent state and United States Supreme Court authority. *See, e.g.*, *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 495 (1976). Appellant has cited no case, and the undersigned have found none, suggesting a result contrary to that reached by the Court of Appeals on this question.

*Question 3*: Appellant alleges that the nondiscriminatory property tax on its imported tobacco, which tobacco receives the same services as all other property in the subject jurisdictions, violates its rights under the Due Process clause of the Constitution. Again, this issue was not presented to or considered and addressed by the Property Tax Commission, and for the reasons stated in question 2, above, should not have been considered by the Court of Appeals.

Notwithstanding, the Court of Appeals squarely and correctly addressed appellant's argument in pages 15 through 17 of its opinion, citing ample recent authority. *See, e.g., Transfer Corp.* v. *County of Davidson*, 276 N.C. 19, 170 S.E. 2d 873 (1969), and cases therein cited. Appellant has cited no case and the undersigned have found no case suggesting a result different from that reached by the Court of Appeals on this issue.

*SUMMARY*

The three constitutional issues addressed by the Court of Appeals (two of which were not presented to or decided by the Property Tax Commission) were resolved against appellant based upon well settled case law. No cases are cited in the notice of appeal which indicate an unsettled constitutional question, and the undersigned are aware of none. Where an appellant fails to present a constitutional question that has not been the subject of clear judicial determination, the appeal should be dismissed. *Thompson v. Thompson*, 288 N.C. 120, 215 S.E. 2d 606 (1975). For these reasons, the appeal should be dismissed.

Respectfully submitted this the 26th day of April, 1985.

/s/ P. Eugene Price, Jr.
P. EUGENE PRICE, JR.

/s/ Johnathan V. Maxwell
JONATHAN V. MAXWELL
Attorneys for Forsyth County and
Its Affected Municipalities

/s/ John G. Wolfe, III
JOHN G. WOLFE, III
Town of Kernersville Attorney

[Address of counsel and certificate of service omitted in printing.]



**RESPONSE OF FORSYTH COUNTY AND ITS AFFECTED MUNICIPALITIES TO PETITION FOR DISCRETIONARY REVIEW FILED APRIL 29, 1985, SUPREME COURT OF NORTH CAROLINA**

[Title omitted in printing]

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA

Pursuant to App. R. 15(d), Forsyth County and its effected municipalities respectfully respond to the petition for discretionary review dated 18 April 1985, and show unto the Court the following:

*PROCEDURAL STATEMENT*

The 1983 tax listings of Reynolds for Forsyth County, Winston-Salem, and Kernersville contained a claim for exemption of $432,448,868 in value of imported tobacco being aged in customs bonded warehouses in Winston-Salem and Kernersville. (Rpp 24, 27). The Tax Supervisor and Board of Equalization and Review unanimously denied the request for exemption. (Rpp 29, 31). R. J. Reynolds appealed to the Property Tax Commission, claiming as its grounds for appeal that the property was exempt because of the "principles set forth by the United States Supreme Court in *Xerox Corp. v. County of Harris, Texas and City of Houston, Texas* 459 U.S. 145, 103 S.Ct. 523, 74 L.Ed. 2d 323 (1982)." (Rpp 3, 4).

In a Final Decision issued 14 December 1983, the Property Tax Commission upheld the denial of the exemption. (Rpp 37-50).

In a thorough unanimous opinion dated 19 March 1985 and certified 8 April 1985, the Court of Appeals affirmed the Property Tax Commission, going so far as to address

two additional constitutional arguments raised by petitioner in the Court of Appeals for the first time.

By petition for discretionary review dated 18 April 1985, petitioner seeks further review in the Supreme Court of North Carolina.

## *STATEMENT OF THE FACTS*

As the Court of Appeals stated in page 2 of its opinion, "The basic facts are undisputed." The subject tobacco was imported from Bulgaria, Syria, Turkey, Lebanon, and Brazil. (Rp 43). It is stored in customs bonded warehouses in order to postpone payment of federal import duties (which will total 35 million to 40 million dollars) until removal of the tobacco from customs bond. (Rp 46). The tobacco is brought to Forsyth County for aging and use there in petitioner's manufacturing operations; Forsyth County is its final destination. (Rp 44). The tobacco is aged in the same manner as domestic tobacco. (Rp 45).

Petitioner owns the customs bonded warehouses (Rp 45). "Customs bond" simply means that Reynolds has paid a private surety or sureties to guarantee payment to the federal government of import duties on the imported tobacco. (Court of Appeals Op., p 2).

The subject imported tobacco benefits from and receives the same police, fire and all other services provided by the county and its affected municipalities to all other citizens of Forsyth County. (Rp 46).

## *REASONS WHY CERTIFICATION SHOULD NOT ISSUE*

Decisions before the Board of Equalization and Review, Property Tax Commission and Court of Appeals have been unanimous against the petitioner. The Court of Appeals' opinion is exhaustive and thoroughly researched, and squarely addresses each of petitioner's arguments. The Supreme Court is respectfully referred to the Court of Appeals' opinion attached to the Petition for Discretionary Review. (Rpp 3, 4).



Public interest in the subject matter of this appeal is not significant. Only the two counties (Forsyth and Durham) where imported tobacco is stored are involved. The legal issues are narrow.

The cause does not involve legal principles of major significance to North Carolina jurisprudence. Rather, petitioner relies on United States Supreme Court authority which does not support their claim for exemption. No conflict with an opinion of the North Carolina Supreme Court has been asserted by the petitioner at any stage in this proceeding, and none appears in the Court of Appeals opinion.

In summary, the well settled principles under the United States Constitution have been correctly and carefully applied to this case by the Court of Appeals, and the narrow subject matter of this proceeding lacks sufficient public interest and state jurisprudential significance to warrant further review by the North Carolina Supreme Court.

Respectfully submitted this 26th day of April, 1985.

/s/ P. Eugene Price, Jr.
P. EUGENE PRICE, JR.

/s/ Jonathan V. Maxwell
JONATHAN V. MAXWELL
Attorneys for Forsyth County
and Its Affected Municipalities

/s/ John G. Wolfe, III
JOHN G. WOLFE, III
Town of Kernersville Attorney

[Address of counsel and Certificate of Service omitted in printing.]

**MOTION TO DISMISS (DURHAM COUNTY)**
**FILED APRIL 29, 1985,**
**SUPREME COURT OF NORTH CAROLINA**

[Title omitted in printing]

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Now comes the Appellee, Durham County, who respectfully shows the Court:

1.

The Appellant, R. J. Reynolds Tobacco Company, has filed a Notice of Appeal under N.C.G.S. § 7A-30 to this Court alleging a substantial question arising under the Constitution of the United States was presented in the North Carolina Court of Appeals Judgment entered April 8, 1985 in the above-referenced action.

2.

The Appellant presented three questions which allegedly involves substantial questions rising under the Constitution. First, that the Court of Appeal's judgment involves a substantial question under the Foreign Commerce Clause and the Supremacy Clause of the United States Constitution. Second, that the Court of Appeals Judgment involves a substantial question arising under the Import Export Clause. Thirdly, that the Court of Appeals Opinion involves a substantial question arising under the Due Process Clause of the United States Constitution.

3.

All three questions presented by the Appellant have been the subject of a conclusive judicial determination either by this Court or by the Supreme Court of the United States. The first question involving the Foreign Commerce Clause and the Supremacy Clause has



been determined in the case of *American Smelting and Refining Co. v. County of Contra Costa*, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570 (1969), appeal dismissed, 396 U.S. 273, 90 S.Ct. 553, rehearing denied, 397 U.S. 958, 90 S.Ct. 940 (1970). The affect of the United States Supreme Court dismissing the appeal from the California Court's judgment is a decision on the merits by the United States Supreme Court. *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977).

4.

The second question presented by the Appellant alleging a violation of the Import-Export Clause has been conclusively determined by the United States Supreme Court in *Limbach v. Hooven & Allison Co.*, —— U.S. ——, 104 S.Ct. 1837, 80 L.Ed.2d 356 (1984).

5.

The third question involving the Due Process Clause of the United States Constitution has been conclusively determined above this Court in *Transfer Corp. v. County of Davidson*, 276 N.C. 19, 170 S.E.2d 873 (1969).

6.

The Court of Appeals in its judgment has cited all the above-referenced cases and their applicability to the case *sub judice*. As all three questions submitted to this Court have been the subject of a conclusive judicial determination, the Appeal should be dismissed under this Court's ruling in *Thompson v. Thompson*, 288 N.C. 120, 215 S.E. 2d 606, 607 (1975).

WHEREFORE, the Appellee, Durham County, prays the Court to enter an order dismissing the Appeal of R. J. Reynolds Tobacco Company from the North Carolina Court of Appeals for the failure of the Appellant to show the existence of a real and substantial Constitu-

tional question which has not already been the subject of a conclusive judicial determination.

Respectfully submitted, this the 29th day of April, 1985.

/s/ S. C. Kitchen
S. C. KITCHEN
Attorney for Appellee,
Durham County

[Address of counsel and Certificate of Service omitted in printing.]



**RESPONSE TO PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31 (DURHAM COUNTY)**
**FILED APRIL 29, 1985**
**SUPREME COURT OF NORTH CAROLINA**

[Title omitted in printing]

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Appellee, Durham County, respectfully responds to the Petition for Discretionary Review filed by the Appellant, R. J. Reynolds Tobacco Company, and petitions the Supreme Court of North Carolina to deny certification for discretionary review the judgment of the Court of Appeals entered April 8, 1985, pursuant to its Opinion filed March 19, 1985, in that the Opinion of the Court of Appeals is well supported by prior judicial determinations by the United States Supreme Court and by this Court and that no new legal principles are involved in the Appeal and therefore the Appeal does not have significant public interest. In support of this response, Appellee shows the following:

## WHY CERTIFICATION SHOULD NOT ISSUE

Appellant contends that the opinion of the Court of Appeals should be reversed in that Appellant is entitled to immunity from ad valorem property taxation based on three separate grounds under the United States Constitution. The Appellant relies on *Xerox Corp. v. County of Harris*, 459 U.S. 145, 103 S.Ct. 523, 74 L.Ed.2d 323 (1982), *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976), and *Billings Transfer Corp. v. County of Davidson*, 276 N.C. 19, 170 S.E.2d 873 (1969). The opinion of the Court of Appeals clearly indicates that the *Xerox* case does not apply to the fact situation presented in this case, and that the *Michelin Tire Corp.* and *Billings Transfer Corp.* cases upon which

Appellant relies do not prohibit ad valorem taxation of property stored in U. S. Customs Bonded Warehouses.

The U. S. Supreme Court in *Xerox Corp. v. County of Harris, supra*, dealt solely with the fact situation in which goods were being stored in United States for export abroad. The Court of Appeals in its opinion correctly held that the factual situation in the present case is different in that the tobacco being stored in Custom Bonded warehouses in Durham and Forsyth Counties is for domestic use and is not intended for export. The Supreme Court of the United States has determined this issue in *American Smelting and Refining Co. v. County of Contra Costa*, 271 Cal. App.2d 437, 77 Cal. Rptr. 570 (1969), appeal dismissed for want of substantial federal question, 396 U.S. 273, 90 S.Ct. 553, 24 L.Ed.2d 462 (1970), rehearing denied, 397 U.S. 958, 90 S.Ct. 940 (1970). In the *American Smelting* case, the California Court was presented with the situation where goods were being held in U. S. customs bonded warehouses for domestic consumption and for export. The Court there held that the goods being held for domestic consumption were taxable and that the goods being held for export were immune from taxation in accord with *Xerox, supra*. The United States Supreme Court subsequently dismissed the appeal of *American Smelting and Refining Co.* in that there was no substantial federal question presented. Such a dismissal is a decision on the merits by the Supreme Court. *Mandel v. Bradley*, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977).

The Appellant has also stated that the imposition of property tax is preempted by the Import-Export Clause of the United States Constitution under the holding of the United States Supreme Court in *Michelin Tire Corp. v. Wages, supra*. The Court of Appeals noted in its opinion that the *Michelin Tire* case does not preclude taxation. Further the Court of Appeals noted that the United States Supreme Court has recently stated that



the focus of Import-Export Clause cases has been changed from the "nature of the goods as imports to the nature of the tax at issue." *Limbach v. Hooven and Allison Co.*, —— U.S. ——, 104 S.Ct. 1837, 1842, 80 L.Ed.2d 356, 363 (1984). Here the question involves ad valorem property taxes which do not discriminate against imports and are clearly permissible.

Appellant argues that imposition of the property tax on bonded tobacco is a violation of the Due Process Clause of the United States Constitution. The argument is based on the theory that the U. S. Customs Bonded Warehouses are not within the "customs territory" of the United States. This Court in *Billings Transfer Corp. v. County of Davidson, supra*, addressed the issue of the Due Process Clause. The Court of Appeals in applying this case has held that there was no violation of due process when the goods were in Durham and Forsyth County and received police and fire protection and other services by Durham and Forsyth Counties.

The arguments raised by the Appellant in the Court of Appeals and in its Petition for Discretionary Review have been conclusively determined by previous decisions of this Court and of the United States Supreme Court. The opinion of the Court of Appeals does not conflict with any U. S. Supreme Court decisions, and in fact is supported by those decisions.

Respectfully submitted, this the 29th day of April, 1985.

/s/ S. C. Kitchen
S. C. KITCHEN
Attorney for Appellee
Durham County

[Address of counsel and certificate of service omitted in printing.]

**ORDER OF THE UNITED STATES SUPREME COURT IN CASES NOS. 85-1021 AND 85-1022 ENTERED FEBRUARY 24, 1986**

"Further consideration of the question of jurisdiction is postponed to the hearing of the cases on the merits. The cases are consolidated and a total of one hour is allotted for oral argument."

# APPELLANT'S

# BRIEF

Nos. 85-1021 and 85-1022

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

R. J. REYNOLDS TOBACCO COMPANY,
*Appellant,*

v.

DURHAM COUNTY, NORTH CAROLINA, *et al.*,
*Appellees.*

**On Appeals from the Supreme Court of North Carolina and the North Carolina Court of Appeals**

## BRIEF FOR THE APPELLANT

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## QUESTIONS PRESENTED

1. Whether a dismissal of an appeal by a state's highest court for lack of a substantial federal constitutional question is a decision on the merits so that an appeal taken pursuant to 28 U.S.C. § 1257(2) lies from such a judgment.

2. Whether the Supremacy Clause prohibits state ad valorem property taxation of imported goods stored in a customs bonded warehouse, particularly in view of the decision of this Court in *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982), and the legislative history surrounding the Warehousing Act of 1846 and the Trade and Tariff Act of 1984.

3. Whether the Due Process Clause or the Import-Export Clause prohibits a state from levying an ad valorem property tax on imported goods stored in a customs bonded warehouse.

## STATEMENT UNDER RULE 15.1

Forsyth County entered an appearance in the court below on behalf of itself and "its affected municipalities." The "affected municipalities" include the City of Winston-Salem, North Carolina and the Town of Kernersville, North Carolina. The Town of Kernersville, North Carolina also appeared as a separate party in the court below. The City of Durham, North Carolina appeared as an *amicus* in the court below.

## STATEMENT UNDER RULE 28.1

R. J. Reynolds Tobacco Company ["Reynolds"] is a wholly-owned, first-tier subsidiary of R. J. Reynolds Industries, Inc. ["Reynolds Industries"], a publicly-held corporation. All domestic subsidiaries and affiliates of Reynolds, except for Combibloc, a joint venture with Jagenberg AG, are wholly-owned, directly or indirectly, by either Reynolds or Reynolds Industries. With regard to its foreign subsidiaries and affiliates, there are seventy-seven such subsidiaries or affiliates which are not wholly-owned, directly or indirectly, by either Reynolds or Reynolds Industries. These are set forth in J.S. App. M, pp. 101a-102a.

## STATEMENT UNDER RULE 28.4

This appeal raises the question of the validity of a North Carolina statute, as applied. Thus, 28 U.S.C. § 2403(b) may be applicable to this proceeding. A copy of this Brief of Appellant has been served on the Attorney General of North Carolina.

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IN THE

# Supreme Court of the United States

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Nos. 85-1021 and 85-1022

---

R. J. REYNOLDS TOBACCO COMPANY,
*Appellant*,

v.

DURHAM COUNTY, NORTH CAROLINA, *et al.*,
*Appellees.*

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**On Appeals from the Supreme Court of North Carolina and the North Carolina Court of Appeals**

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## BRIEF FOR THE APPELLANT

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### DECISIONS BELOW

The Judgment of the Supreme Court of North Carolina Dismissing Appeal and Denying Petition for Discretionary Review (J.S. App. A, pp. 1a-2a) is reported at 314 N.C. 540, 335 S.E.2d 21. The Opinion of the North Carolina Court of Appeals (J.S. App. C, pp. 5a-19a) is reported at 73 N.C. App. 475, 326 S.E.2d 911. The Final Decision of the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review (J.S. App. D, pp. 21a-37a) is unreported.

### JURISDICTION

The judgment of the North Carolina Court of Appeals was entered on April 8, 1985. (J.S. App. B, p. 3a.)

The judgment of the Supreme Court of North Carolina, dismissing an appeal and denying a petition for dis-

cretionary review, was entered on October 2, 1985. (J.S. App. A, pp. 1a-2a.)

A notice of appeal from the judgment of the Supreme Court of North Carolina (J.S. App. E, p. 39a) was filed in the Supreme Court of North Carolina on November 14, 1985. A copy of that notice of appeal was also filed on the same day in the North Carolina Court of Appeals, it being the court possessed of the record.

A notice of appeal from the judgment of the North Carolina Court of Appeals was filed in that court on November 14, 1985. (J.S. App. F, p. 41a.)

These appeals were docketed on December 16, 1985, within ninety days after the entry of the judgment of the Supreme Court of North Carolina. On February 24, 1986, this Court entered an order postponing consideration of the question of jurisdiction to the hearing on the merits. (J.A., p. 114.) This Court also ordered that the two cases be consolidated for hearing before this Court.

Further discussion of the jurisdiction of this Court is set out below under Point I of the Argument in this brief.

## CONSTITUTIONAL PROVISIONS INVOLVED

*United States Constitution. Article I, Section 8, Clause 1*

The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises. . . .

*United States Constitution, Article I, Section 8, Clause 3*

[The Congress shall have Power] To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

*United States Constitution, Article I, Section 10, Clause 2*

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except



what may be absolutely necessary for executing it's inspection Laws. . . .

*United States Constitution, Article VI, Clause 2*

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*United States Constitution, Amendment XIV, Section 1*

No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

## FEDERAL STATUTES AND REGULATIONS INVOLVED

The federal statutes involved are set forth in J.S. App. L, pp. 61a-71a; the federal regulations involved are set forth in J.S. App. L, pp. 73a-100a.

## NORTH CAROLINA STATUTES INVOLVED

*N.C. Gen. Stat.* §§ 7A-30 and 7A-31 are set forth in Appendix A to this brief, *infra*, pp. 1a-3a.

*N.C. Gen. Stat.* § 105-274 (the "taxing statute") is found at J.S. App. L, p. 72a.

## STATEMENT

This is an appeal by Reynolds challenging the constitutionality, as applied, of North Carolina's ad valorem personal property tax levied for the 1983 tax year on imported tobacco stored in customs bonded warehouses. The North Carolina courts rejected Reynolds' argument that its claim of immunity from taxation is squarely governed by this Court's recent decision in *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982), where this Court held (459 U.S. at 154) that—

state property taxes on goods stored under bond in a customs warehouse are pre-empted by Congress' comprehensive regulation of customs duties.

Reynolds is a New Jersey corporation authorized to do business in North Carolina. (J.S. App. D, p. 26a.) It is engaged in the business of manufacturing finished tobacco products which, in the words of the North Carolina Court of Appeals, "it sells to wholesale distributors and other authorized purchasers in the United States and abroad." (J.S. App. C, 6a.)[1]

Reynolds uses tobacco grown both in the United States and in foreign countries when manufacturing finished tobacco products in North Carolina. (J.S. App. D, pp. 26a, 28a.) The foreign tobacco used in this process is placed under customs bond at the various ports of entry. (J.S. App. D, p. 29a.) Thereafter, it is shipped either to Durham County or Forsyth County, North Carolina, by customs bonded carriers, and is placed in customs bonded warehouses owned by Reynolds.[2] (J.S. App. D,

[1] This finding is supported by the Order on Final Pre-Hearing Conference with Durham County (J.A., pp. 41-42), signed by counsel for both parties, which states that the parties hereto stipulate and agree with respect to the following undisputed facts:

> Reynolds sells such products to wholesale distributors and other outside purchasers in the United States and other countries.

The Order on Final Pre-Hearing Conference with Forsyth County states that "finished tobacco products [are manufactured] in Forsyth County," but makes no statement with respect to where these products are sold. (J.A., p. 47.)

The record contains undisputed testimony that "virtually all" of the imported leaf tobacco involved here was used to manufacture cigarettes in North Carolina (J.A., p. 55), and that the "greater majority" of cigarettes so manufactured were sold for consumption in the United States. (J.A., pp. 55-56.)

[2] The warehouses and the land on which they are situated are subject to ad valorem taxes levied on real property in North Carolina. (J.S. App. D, p. 32a.) These taxes have been paid and are not in issue here.



pp. 29a, 30a.) The imported tobacco is usually held in the customs bonded warehouses for about two years before being withdrawn by Reynolds for use in its manufacturing operations. (J.S. App. D, p. 32a.) In accordance with the federal statutes and regulations, Reynolds does not pay the applicable customs duty until the time of withdrawal. (J.S. App. D, p. 32a.)

In listing its taxable personal property for 1983 in both Durham and Forsyth Counties, Reynolds claimed that the imported tobacco stored in the customs bonded warehouses in both counties was immune from taxation on federal constitutional grounds, in accordance with the decision of this Court in *Xerox*. (J.A., pp. 6, 10, 13.) The separate claims of immunity were denied by the respective tax supervisors (assessors) of Durham County and Forsyth County. (J.A., pp. 15, 18.) The denials were subsequently affirmed by the board of equalization and review for each county. (J.A., pp. 20, 23.)

Reynolds, thereafter, filed separate appeals (which were consolidated for hearing) with the North Carolina Property Tax Commission claiming that the imported tobacco stored under bond in the customs warehouses in each county was immune, under several clauses of the Constitution of the United States, from the North Carolina property tax. (J.A., pp. 29, 34.) Reynolds' claims of immunity from ad valorem personal property taxes were denied by the North Carolina Property Tax Commission. (J.S. App. D, pp. 34a-37a.) Reynolds then appealed to the North Carolina Court of Appeals. In affirming the decision of the North Carolina Property Tax Commission, the Court of Appeals concluded that a nondiscriminatory ad valorem personal property tax levied on "imported goods" stored under bond in a customs warehouse, which goods are "not destined for foreign markets," is not proscribed by the Supremacy Clause, the Import-Export Clause, the Foreign Commerce Clause or the Due Process Clause of the United States Constitution. (J.S. App. C, pp. 16a, 18a.)

Reynolds next appealed to the Supreme Court of North Carolina, claiming that the denial of immunity from taxation violated the Supremacy Clause, the Foreign Commerce Clause, the Import-Export Clause and the Due Process Clause of the United States Constitution. (J.A., pp. 95, 97.) The appeal was dismissed without opinion, for lack of a substantial constitutional question, and a petition for discretionary review of the decision of the North Carolina Court of Appeals was concurrently denied. (J.S. App. A, pp. 1a-2a.)

## SUMMARY OF ARGUMENT

1. The issue of which state court to appeal from to this Court when the highest court of the state has dismissed an appeal to it for lack of a substantial federal constitutional question has created an undue amount of perplexity. The issue, which arises under the opening clause of 28 U.S.C. § 1257 and Sup. Ct. R. 10 governing procedure on appeal, turns on a question of state law; *i.e.*, whether such a dismissal by a state's highest court is a decision on the merits or merely a decision by the state's highest court that it lacks jurisdiction. That question remains unresolved in many jurisdictions and, indeed, appears unresolvable absent a clear statement on the matter from the relevant jurisdiction. In several decisions, this Court has appeared to answer the question in different ways. *E.g.*, *Matthews v. Huwe, Treasurer*, 269 U.S. 262 (1925); *Doyle v. Ohio*, 426 U.S. 610 (1976).

This Court could solve the problem in this case by adopting the view of the North Carolina Supreme Court, informally communicated to Reynolds, that it does not regard such a dismissal as a ruling on the merits. However, that would not prevent the question from arising again in subsequent cases coming from other jurisdictions. It is suggested that this Court may wish to consider adopting a Rule which would provide that an appeal which is taken from such a dismissal by a state's highest court will not be dismissed merely because it is later



determined that the appeal should have been taken from the judgment of a lower state court. Such a Rule would eliminate unnecessary confusion and prevent unwarranted hardship.

2. In *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982), this Court held that the states are pre-empted from imposing ad valorem property taxes on imported goods stored in customs bonded warehouses. This Court's holding in *Xerox* was made without qualification as to whether the goods were intended for domestic use or for reexport. In this case, Reynolds' imported tobacco is used in its domestic manufacturing process following storage in customs bonded warehouses. Reynolds' finished tobacco products are sold both in the United States and abroad.

The North Carolina Court of Appeals incorrectly concluded that *Xerox* is limited to property destined for reexport upon withdrawal from customs bond. In fact, this Court did not so limit its holding. This Court's broad holding in *Xerox* is supported by the pertinent legislative history which reveals that Congress intended to: facilitate foreign commerce which uses U.S. ports; provide importers who store their goods in customs bonded warehouses flexibility in determining whether to sell into the domestic or foreign markets upon withdrawal of the goods from customs custody; and stimulate and aid domestic manufacturing activity which uses imported raw materials. The relevant statutes, regulations, and legislative history also clearly reveal that Congress did not regard the import process as complete until goods are withdrawn from customs bond and that Congress intended to, and did in fact, establish a comprehensive regulatory scheme governing every aspect of the import process. State property taxes imposed on goods while stored in customs bonded warehouses are, therefore, pre-empted both because Congress intended to "occupy the field" of regulation respecting such goods and because such taxes stand "as an obstacle to the accomplishment of the

full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

3. Congress ratified the Court's broad holding in *Xerox* when it adopted the Trade and Tariff Act of 1984. The Act amended the Foreign Trade Zone Act to provide that imported goods held in such a zone are exempt from state and local property taxation. This statutory exemption, which applies both to goods held for import and for re-export, was made on the basis of the sponsors' express references to the *Xerox* decision and their statements that they intended to avoid further litigation by making clear that goods stored in foreign trade zones are constitutionally protected from state and local taxes in the same way that *Xerox* found that goods stored in customs bonded warehouses are protected.

4. The Due Process Clause forbids a state to tax goods which are not within its jurisdiction. *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 204 (1905). The Import-Export Clause prohibits a state from taxing goods which are still in import transit. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 302, *reh'g denied*, 424 U.S. 935 (1976); *Department of Revenue of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 757 n.23 (1978).

Both the Due Process and Import-Export Clauses prohibit the taxes here in issue. Imported property stored in a customs bonded warehouse is "without [the] jurisdiction" of a state until withdrawn from customs custody. *Xerox*, 459 U.S. at 153-154; *District of Columbia v. International Distributing Corp.*, 118 U.S. App. D.C. 71, 73-74, 331 F.2d 817, 819-820 (1964). In addition, imported property stored in customs bonded warehouses remains "in transit" because "Congress did not regard the importation as complete while the goods remained in the custody of the proper officers of the customs." *Fabbri v. Murphy*, 95 U.S. 191, 197-198 (1877).



## ARGUMENT

### I. JURISDICTION.

The applicable statute covering this Court's jurisdiction is 28 U.S.C. § 1257, which provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.[3]

No question has been raised by the appellees with respect to any aspect of this Court's jurisdiction. Indeed, there is no doubt that the terms of clause (2) of the statute have been met. There is a North Carolina statute[4] which was held to be constitutional, as applied, against attacks based on several clauses of the federal Constitution. So far as clause (2) is concerned, the question of this Court's jurisdiction appears to be settled by *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-441 (1979), and *Xerox Corp. v. County of Harris*, 459 U.S. 145, 149 (1982).

Thus, the only real question raised here involves the application of the opening clause of 28 U.S.C. § 1257. Specifically, it requires a determination as to which of the two appellate courts below is "the highest court of [North Carolina] in which a decision could be had." The construction of this federal statute is a matter for determination by this Court.

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[3] This Court's Rule 10 implements this statute but does not resolve its ambiguity.

[4] *N.C. Gen. Stat.* § 105-274 (J.S. App. L, p. 72a).

It would appear that, in postponing the question of jurisdiction to the merits, this Court was inviting the views of counsel on this question. Accordingly, this portion of this brief will be devoted to a consideration of that question, although the appellant is not concerned as to which appeal is properly before the Court, as long as jurisdiction over one of the appeals is sustained.

Any question as to the jurisdiction of the North Carolina Supreme Court is a matter of North Carolina law. The applicable statutes are *N.C. Gen. Stat.* §§ 7A-30 and 7A-31.[5] If the only action of the North Carolina Supreme Court [6] had been a denial of Reynolds' petition for discretionary review under *N.C. Gen Stat.* § 7A-31, it would be clear that the North Carolina Court of Appeals was the "highest court in [North Carolina] in which a decision could be had."

Reynolds also sought review of the judgment of the North Carolina Court of Appeals by way of appeal under *N.C. Gen. Stat.* § 7A-30, which reads in pertinent part:

> [A]n appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case:
>
> (1) Which directly involves a substantial question arising under the Constitution of the United States or of this State.

The first part of the order of the Supreme Court of North Carolina shows that Forsyth and Durham Counties moved "to dismiss the appeal for lack of a substantial federal constitutional question." By action of the North Carolina Supreme Court, this motion was—

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[5] The full text of each statute is set forth in the Appendix to this Brief, *infra*, App. A, pp. 1a-3a.

[6] J.S. App. A, pp. 1a-2a.



> Allowed by order of the Court in conference, this the 19th day of September 1985.

J.S. App. A, p. 1a.

This could be interpreted as a decision on the merits, affirming the judgment of the North Carolina Court of Appeals, on the ground that the appeal to the Supreme Court presented no substantial constitutional question.[7] In the alternative, the North Carolina Supreme Court may have decided that, in its judgment, this case did not involve a substantial question under the federal Constitution and that it, therefore, lacked jurisdiction under *N.C. Gen. Stat.* § 7A-30.

Thus, it is readily possible to argue this question either way, that is, (1) that the North Carolina Supreme Court, "the highest court of [that] state in which a decision could be had," made a judicial determination against the federal constitutional claim, on a non-discretionary basis, by *deciding* that there was no substantial federal question, or (2) that it decided that *it did not have jurisdiction* to hear the case.

The distinction between these two approaches is, indeed, unsolvable, like the problem of the priority of the chicken and the egg. While the Supreme Court of North Carolina apparently does not regard its judgment dismissing the appeal as a decision on the merits,[8] this

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[7] Such a view would be consistent with this Court's view of its own actions in dismissing appeals "for want of a substantial federal question." *See Hicks v. Miranda*, 422 U.S. 332, 343-345 (1975), and *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *see also* R. Stern, E. Gressman and S. Shapiro, Supreme Court Practice (6th ed. 1986) §§ 4.28-4.30; hereafter cited as "Supreme Court Practice."

[8] Reynolds was "advised by the Clerk of the North Carolina Supreme Court that a judgment dismissing an appeal of right for lack of a substantial constitutional question is not regarded by that Court as a decision on the merits." Jurisdictional Statements, p. 2, n. 1.

There are no reported decisions from the Supreme Court of North Carolina which discuss the effect of a dismissal of an appeal

Court has, in prior decisions, taken a contrary position in cases coming to the Court from other jurisdictions with an analogous state appellate procedure.[9] *See Hetrick v. Village of Lindsey*, 265 U.S. 384, 386 (1924); *Matthews v. Huwe, Treasurer*, 269 U.S. 262 (1925); *Tumey v. Ohio*, 273 U.S. 510, 515 (1927); and *Van Huffel v. Harkelrode, Treasurer*, 284 U.S. 225, 230-231 (1931). In *Matthews*, the Court stated (269 U.S. at 265) that:

> We think, however, that . . . the state Supreme Court did pass on the merits of the case by holding that the questions involving the Constitution of the United States, and being the only ground for a writ of error from this Court, were not debatable. It is one of those not infrequent cases in which decision of the merits of the case also determines jurisdiction. The petition was dismissed, not because the court was really without jurisdiction, for it could have taken it, but because the question was regarded as frivolous, which is a different thing from finding that the petition was not in character one which the Court could consider.

Later, however, in *Doyle v. Ohio*, 426 U.S. 610 (1976), the Court allowed a writ of certiorari to issue to an intermediate court of appeals after the Supreme Court of Ohio, *sua sponte*, dismissed an appeal for lack of a substantial constitutional question and denied any discretionary review.[10] This was done without reference to *Hetrick* or *Matthews*.

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under *N.C. Gen. Stat.* § 7A-30 for lack of a substantial constitutional question. The North Carolina Rules of Appellate Procedure do not discuss this issue.

[9] A generally similar situation, with some differences in detail, exists "in over half of the states, including New York, California, Texas, Maryland, Illinois, Ohio, and Florida." *See* Supreme Court Practice at p. 350.

[10] *See* pp. 68 and 70 of the Joint Appendix in *Doyle v. Ohio*, No. 75-5014, October Term, 1975. For a general discussion indicating the continuing problems in the area, *see* Supreme Court Practice §§ 3.16-3.17 and 6.21.



A decision of the Court as to jurisdiction in these cases will clarify the situation with respect to the North Carolina statute and the particular judgments involved here. But there are many variations, both in state statutes and in the types of judgments used by state courts. This Court's decision in this case may give some general guidance, but it will not eliminate all of the confusion and uncertainties in the area.

This Court may wish to consider the adoption of a Rule which would make irrelevant this intricate but purely technical question while maintaining the essence of 28 U.S.C. § 1257. Such a rule could provide that where an appeal is taken from the highest court of a state, the appeal will not be dismissed by this Court if it is found that the appeal should have been taken from the judgment of an inferior court in that state's judicial system. This would fully comply with the purpose and spirit of 28 U.S.C. § 1257, which is to allow an appeal from a lower court when there is no higher court in the state from which a decision can be had. But if a case has been considered in any way by a higher court in the state, Congress was surely not concerned about the intricacies of intercourt jurisdiction in state courts.

The name of the court from which the appeal is taken is merely formal, and, under an appropriate rule of this Court, should not be regarded as relevant in determining this Court's jurisdiction of the appeal.

Such a rule would go far to minimize difficulties and confusion in this area. It would be no more an extension of the statute enacted by Congress than has long been included in this Court's Rules. *See*, for example, Sup. Ct. R. 29.1 which provides that the period of time prescribed "by an applicable statute" shall not include "a Sunday or federal legal holiday" where that is the "last day of the period." *See also*, Sup. Ct. R. 28.2, providing for filing by deposit "in a United States post office or mailbox, with first-class postage prepaid." These,

as well as the proposed rule, constitute appropriate interpretations or practical applications of long-standing procedural statutes.

## II. THE COURT CORRECTLY DETERMINED IN THE 1982 XEROX CASE THAT CONGRESS PRE-EMPTED STATE TAXATION OF IMPORTED PROPERTY STORED IN CUSTOMS BONDED WAREHOUSES.

In *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982), this Court was asked to decide whether it was constitutionally permissible for a state to impose an ad valorem property tax on personal property stored under bond in a customs warehouse.[11] The clear and unambiguous holding of the Court in *Xerox* is that (459 U.S. at 154):

> state property taxes on goods stored under bond in a customs warehouse are pre-empted by Congress' comprehensive regulation of customs duties.

The only difference between this case and *Xerox* is that Reynolds had, on the tax lien date in North Carolina, a general intention to use the imported property in question in its domestic manufacturing operations, when the property was ultimately removed from customs custody, while Xerox Corporation had, on the tax lien date in Texas, a general intention to reexport its property. It is significant to note, however, that on the tax lien date, Reynolds' expectation regarding the ultimate use of its imported property was not irrevocable, just as Xerox Corporation was under no obligation to reexport its imported property which, nonetheless, was found to be immune from taxation under the Supremacy Clause.[12]

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[11] This issue would not have arisen prior to the rejection of the "original package doctrine" in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, *reh'g denied*, 424 U.S. 935 (1976).

[12] The Court recognized in *Xerox* that the copiers in question there could be withdrawn "for domestic sale" at the "option" of the owner by merely paying the duty. 459 U.S. at 153. *See* 19 U.S.C. § 1557(a) (1982).



The North Carolina Court of Appeals narrowly read the decision in *Xerox* to refer only to goods imported and stored in a customs bonded warehouse pending reexport.[13] It is clear, however, from a plain reading of the decision in *Xerox* that this Court found pre-emption from state taxation for *all* imported goods stored in a customs bonded warehouse regardless of the intention of the importer as to ultimate use. This decision, as the Court noted, finds a firm basis in the legislative history surrounding the Warehousing Act of 1846.[14]

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[13] J.S. App. C, p. 14a.

[14] The role of customs warehouses in the Congressional plan for foreign commerce dates to the Warehousing Act of 1846, ch. 84, 9 Stat. 53. *Xerox*, 459 U.S. at 150. The current version of the warehousing system, the Tariff Act of 1930, and the Regulations promulgated thereunder, set forth a comprehensive scheme regulating goods brought into the United States. Ch. 497, 46 Stat. 590 (1930), codified as amended at 19 U.S.C. §§ 1202-1677g (1982); 19 C.F.R. §§ 4-355.50 (1983). As part of the regulation of the importation process, the statutes and regulations specify the process whereby goods are maintained in customs custody before customs entry into the United States.

The regulation of the process whereby goods are unloaded from vessels, placed in customs bond, transported to the bonded warehouse, and stored therein is extensive. Control by customs officials is assured by elaborate documentation and audit procedures. All goods under customs bond are required by law to be segregated from other property and, unless specifically authorized by law, the goods are neither commingled with other goods, domestic or imported, nor manipulated while in bond. *See, e.g.*, 19 U.S.C. §§ 1555-1565 (1982), 19 C.F.R. §§ 19.1-19.49 (1983).

There are eight classes of customs warehouses. Involved in this case are Class 2 and Class 8 customs warehouses. (J.S. App. D., p. 29a.) Class 2 warehouses are private bonded warehouses used exclusively for the storage of merchandise belonging or consigned to the proprietor thereof. 19 C.F.R. § 19.1(a)(2) (1983). Class 8 warehouses are bonded warehouses established for the purpose of cleaning, sorting, repacking or otherwise changing in condition, but not manufacturing, merchandise, under customs supervision and at the expense of the proprietor. 19 C.F.R. § 19.1(a)(8) (1983). Goods

In discussing the purposes and objectives of the Warehousing Act of 1846, the Court recognized that "A major objective of the warehousing system was to allow importers to defer payment of duty until the [imported] goods entered the domestic market or were exported." 459 U.S. at 150. Although not specifically relied on in *Xerox*, a similar statement was made by the Court only five years after the 1846 Act became law. In *Tremlett v. Adams*, 13 Howard 295, 303 (1851), the Court stated that:

> [The Warehousing Act of 1846] is a part of the general and permanent system of revenue; and its evident object is to facilitate and encourage commerce by exempting the importer from the payment of duties, until he is ready to bring his goods into market.[15]

In further examining the legislative history of the Warehousing Act of 1846 in *Xerox*, the Court also stated that "Congress was willing . . . to defer, for a prescribed period, the duty on goods destined for American consumption" in order "to encourage merchants here and abroad to make use of American ports." The Court then framed the pre-emption question as:

> whether it would be compatible with the comprehensive scheme Congress enacted to effect these goals if the states were free to tax *such goods* [a reference to "goods destined for American consumption"] while they were lodged temporarily in Government-regulated bonded storage in this country.

459 U.S. at 151, emphasis added. It was on this question that the Court stated its clear and comprehensive conclusion, as already noted, that:

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in Class 8 customs bonded warehouses may be manipulated only to the extent permitted by law with the prior approval of customs. 19 C.F.R. § 19.11(d) (1983).

[15] Although the question before the Court in *Tremlett* did not involve state taxation of imported property, the property in question there (coal) was being held for sale in a domestic market.



> state property taxes on goods stored under bond in a customs warehouse are pre-empted by Congress' comprehensive regulation of customs duties.

*Id.* at 154.

The questioning of both counsel during oral argument in the *Xerox* case also clearly indicates that the Court did not use this broad language by inadvertence and that it intended its holding in *Xerox* to be read to encompass goods imported for domestic use or consumption as well as goods imported for reexport. The following question posed by the Court to counsel for the taxing authorities is evidence of this intention:

> Question: So it really doesn't make any difference in this case as to whether they were destined for a foreign market.
>
> Ms. Chapman: Absolutely not.[16]

A similar question to counsel for Xerox followed:

> Question: Well, is an importer who says, yes, these are going to be sold in the United States, and he puts them in a bonded warehouse, and holds them for two years, may Texas levy a tax while they are in the warehouse?
>
> Mr. Hoddinott: No sir, that is directly opposed to the legislative purpose of the Warehousing Act.[17]

Finally, the Court, in deciding the "question" in *Xerox*, noted that it had previously considered the issue of pre-emption from state taxation in *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940). The Court stated in *Xerox* that its "analysis in *McGoldrick* applies with full force here." 459 U.S. at 153. The Court then concluded that:

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[16] Transcript of Oral Argument in *Xerox* case at p. 36 (J.S. App. G, p. 46a).

[17] Transcript of Oral Argument in *Xerox* case at pp. 48-49 (J.S. App. G, p. 47a).

> Although there are factual distinctions between this case and *McGoldrick*, they are distinctions without a legal difference. We can discern no relevance to the issue of congressional intent in the fact that the fuel oil in *McGoldrick* could be sold only as ships' stores whereas Xerox had the option to pay the duty and withdraw the copiers for domestic sale.

459 U.S. at 153.

Clearly, it was the pervasive and comprehensive scheme enacted by Congress providing for continued federal control of property in customs warehouses, and *not* the ultimate destination of such property, that led the Court to conclude in *Xerox* that states are pre-empted from imposing ad valorem property taxes on goods stored under bond in a customs warehouse.

**Congress Intended Pre-emption Without Regard to Ultimate Use**

The test for pre-emption, which finds its origin in several opinions rendered prior to *Xerox*, was subsequently summarized in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). There this Court said that:

> [S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. [Citations omitted.] If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent that it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress . . . .

Of the "two general ways" in which pre-emption may exist, the Court did not specify in *Xerox* which situation was found to exist or whether both exist. The broad and unqualified conclusion of the c nion in *Xerox* would indicate a finding of total pre-emption. Specific refer-



ences to the legislative history of the Warehousing Act of 1846 also evidence a conclusion that state taxation of any property in a customs bonded warehouse "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood*, 464 U.S. at 248.

Careful examination of the legislative history of the 1846 Act supports the holding in *Xerox* and plainly shows the inconsistency between the rule of law adopted by the appellate court below and the objectives of Congress in establishing the customs bonded warehouse system. The pertinent legislative history includes the Report of the Committee on Commerce of the House of Representatives,[18] and two statements to the Senate, on June 19 and July 9, 1846, by Senator Dix of New York, a member of the Senate Committe on Commerce and a sponsor of the Bill.[19]

The Report and the statements show that the Warehousing Bill was a response to the "severe and injurious" burdens and restrictions which resulted from the Act of March 2, 1833[20] and the Act of August 30, 1842.[21] The former enactment had responded to collection problems arising when, under earlier law, importers could obtain possession of some or all of their goods and defer payment of duty by filing a bond secured by sureties or a portion of the goods. The 1833 Act also provided for progressive reduction of duties up to July 1, 1842,

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[18] H.R. Rep. No. 411, 29th Cong., 1st Sess. (1846); hereafter cited as "Report". For the convenience of the Court, the full text of the House Report is printed in Appendix B to this Brief, *infra*, pp. 4a-16a.

[19] Cong. Globe 29th Cong., 1st Sess., App. 789-798 (1846) (remarks of Sen. Dix; hereafter cited as "Dix"). Extracts from the speeches of Senator Dix are printed in Appendix C to this Brief, *infra*, pp. 17a-25a.

[20] Ch. 55, § 3, 4 Stat. 630.

[21] Ch. 270, 5 Stat. 548.

and required that, effective on that date, payment of duty must be made in cash when the goods were unloaded from the vessel. The 1842 Act continued the cash payment requirement, raised the average duty from 20% to as high as 40%, and extended the duty to additional categories of imports.[22]

The combination of these two measures was considered by the sponsors of the 1846 Act to result in "great hardship." [23] The 1846 Act was designed to remedy the hardship and facilitate commerce and manufacturing.

In the words of Senator Dix, "The first and greatest benefit to the commercial interest is the relief [the Act] will afford from the present system of exacting the payment of duties in cash, on the completion of the entry of merchandise." [24] The Act authorized customs bonded warehouses in which any form of imported merchandise could be stored, with no payment of duty until the merchandise was withdrawn for consumption or use in the domestic economy.[25] No interest was to be charged at that time. This deferral of payment was intended to reduce the capital requirements of importers and thereby "enlarge the circle of competition in the business of importation." [26] This change was also intended to reduce costs to users of imported goods by permitting the duty to be paid by the domestic purchaser instead of the importer, thereby eliminating the customs duties from the costs on which the importers' markup (apparently, generally 12%) was based.[27]

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[22] Report at p. 1; Dix at 790.

[23] Dix at 790.

[24] *Id.* at 792.

[25] This was recognized by the Court in *Tremlett v. Adams, supra,* 13 Howard at 303.

[26] Dix at 792.

[27] Report at 3-4.



Second, the new system extended the time before which the duty must be paid to one year, thereby giving the importer a greater opportunity to find a buyer for the goods.[28] This enlarged sales opportunity, the Committee Report asserted, would prevent a "fruitful source of complaint with our manufacturers." The complaint was that, for lack of an adequate opportunity for importers to find domestic customers, foreign goods were thrown into our markets at distress prices.[29]

The 1846 Act was also intended to afford the importer flexibility in choosing between selling into the domestic market and reexporting to another country. The risk was real to an importer of merchandise that the quantity imported would exceed the amount which could be sold or used domestically. The opportunity to decide, after the date of importation, that a quantity was excess, and should be resold abroad, was a valuable hedge against risk. It permitted importers and manufacturers alike to give orders to European suppliers based on the maximum forecasted needs, rather than the minimum assured sales or utilization. Senator Dix therefore supported his Bill by observing that:

> Under the present system, if imported merchandise is entered for exportation, the duties are not refunded until after the exportation has actually taken place. Thus, if an importer, having brought merchandise into the country for the domestic market, and having paid the duties, finds at the end of one, two, or three years, no demand for it at home, and is compelled to reexport it, he will have lost during that

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[28] Currently, goods may be stored duty-free in customs bonded warehouses for five years. Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, Title I, § 108(b)(1), 92 Stat. 892 (codified at 19 U.S.C. § 1557(a) (1982)). The extension to five years authorized by this Act is evidence of the continued concern of Congress to facilitate foreign commerce through the enlarged availability of customs bonded warehouses.

[29] Report at 6.

> period the use of the money he has paid for the duties, and he is taxed in addition two-and-a-half percent on the whole amount so paid as a premium to the Government for the privilege of sending his goods to a foreign market. . . . Under the proposed plan, foreign merchandise will be allowed to be freely deposited in store, and to be reexported as freely *with no other imposition than the payment of actual expenses of storage, &c.*

Dix at 792; emphasis supplied.

The importance of allowing the importer flexibility to sell into the U.S. market or reexport abroad, as market conditions dictated, was also stressed to the House of Representatives. Referring to the British warehousing system, the objectives of which were similar to the objectives of the Warehousing Act of 1846, the Report states that:

> The system first invites the importation of these products into the English ports, selects *so much of them as is required for home consumption*, and then leaves to British trade the distribution of the surplus over the whole of Europe.

Report at 5; emphasis supplied.

The flexibility provided by the Act was designed to encourage not only commerce but also manufacturing. The sponsors believed it would help prevent shortages of critical items. Senator Dix asserted:

> [T]he manufacturing interest, next to the commercial, is likely to be most benefited by the proposed measure, through supplies of merchandise near at hand, ready to meet sudden and unusual demands, thus preventing a transient scarcity from becoming the basis of speculation, and furnishing an additional safeguard against those derangements which are always the most injurious to steady industry.

Dix at 792.

The debate on the Warehousing Bill in the Senate was closed by Daniel Webster. Speaking in support of the



Bill, he said that ". . . a well-regulated warehouse system does give considerable facilities to the foreign commerce of the country." And he added—

> my opinion is, that it should rather be an object to protect the domestic industry of the country by laying protective duties upon such articles as are manufactured at home, rather than by obstructing the foreign commerce of the country, or withholding from it such facilities as may make it more and more extensive. . . .

Cong. Globe, 29th Cong., 1st Sess. 1097 (July 15, 1846).

The long continued Congressional purpose to design the customs rules to encourage domestic manufacturing using imported raw materials is also confirmed by the duty drawback (refund) system long in force.[30] Under the drawback provisions, 99% of the duty paid on imported raw materials which are used to manufacture or produce a finished product, which is later exported, will be refunded. When Reynolds uses imported tobacco in its domestic manufacturing operation to produce cigarettes, some of which will be sold "abroad,"[31] it receives a drawback of the duty paid on the raw materials that were used to produce the cigarettes so exported. Thus, the imported tobacco used by Reynolds remains, in substance, in the over-all customs system and is freed from customs obligation (except for 1 per cent) to the extent that it is eventually exported.

It is clear that among the purposes of Congress in enacting the Warehousing Act of 1846 was removal of barriers to the warehousing in this country of goods imported for ultimate use or consumption here.[32] Allow-

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[30] *See generally* 19 U.S.C. § 1313 (1982).

[31] *See* p. 4, n.1, *supra.*

[32] Congress, legislating during the Mexican War, sought an extensive system of warehouses since, in the words of the House Report, "Another consideration not to be lost sight of, is the supply

ing even nondiscriminatory state and local property taxes to be imposed on such goods stored in a customs bonded warehouse would clearly create an incentive for the storage of such goods abroad until they were ready for use or consumption in this country.

The conclusion of this Court in *Xerox*, that the Warehousing Act of 1846, and its successors, pre-empt the states from taxing any goods in customs bonded warehouses, is clearly consistent with the purposes of the Act to encourage commerce and manufacturing. Allowing the states in which customs bonded warehouses were to be located to impose personal property taxes on the imported goods so stored would not have (1) reduced the capital requirements of importers, (2) contributed to enlarging the circle of competition in the business of importation, (3) avoided the markup on the state tax liability incurred while the goods were in storage, (4) helped avoid production shutdowns because demand had exceeded forecast and sufficient quantities of needed products were not available in warehouses in this country, or (5) encouraged storage of goods in this country until they were ready for use or consumption here.

The conclusion of this Court in *Xerox* is also required by another stated purpose of the Act—to afford flexibility to the importer. There is no way in which an importer can pay state property tax on goods destined for the domestic market, but not on goods destined for reexport, *and*, at the same time, maintain flexibility as to where the goods are to be sold.

The North Carolina personal property tax is imposed on property on hand on a prescribed day of the year. The decision below imposes a rule under which importers

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these warehouses would afford in the event of war." Report at 4. In addition, the Act was viewed as a way to make cities "depots of merchandise for the supply of interior districts, of which they are respectively outlets. . . ." Dix at 798.



would, on such date, be required in some way to designate taxable goods intended for the domestic market and nontaxable goods destined for reexport. How is the importer to make this determination? What is an importer to do in a jurisdiction in which the personal property tax levied on inventory is based on the average of the amounts on hand at the end of each month of the taxable year? Should he project experience from a prior period? Should he make his best estimate of future sales? If the latter, how does a state audit the integrity of the importer's claim? May a state require segregation of nontaxable reexport bound goods from taxable domestic bound goods when there is no such requirement in federal customs regulations? May a state assert a lien over property stored in a customs bonded warehouse when the assessed taxes are not paid?

These practical difficulties are real. They would greatly complicate and frustrate the administration and utility of customs bonded warehouses. Avoiding them is in itself a sufficient ground for this Court's holding in *Xerox* that Congress pre-empted state taxation of all goods stored in customs bonded warehouses, not merely those supposed to be destined for reexport.

The legislative history of the 1846 Act is not merely a sufficient ground for this Court's broad holding in *Xerox*; it *requires* the broad holding. There is no way to reconcile the expressed intention of Congress to allow importers to decide, as much as a year after importation, whether imported goods should be sold in a domestic market or reexported, with allowing the imposition of state property taxes on goods destined for the domestic market but not on goods destined for reexport. Any such contraction of the broad *Xerox* holding would be diametrically contrary to the clearly expressed intention of Congress that "foreign merchandise will be allowed to be freely deposited in store, and to be reexported as freely, with no other imposition than the payment of actual ex-

penses of storage, &c." [33] Indeed, proposals to amend the bills, which became the 1846 Act, to require importers to designate in advance what portion of imported goods in a customs bonded warehouse were to be re-exported were specifically considered and rejected by both Houses of Congress.[34]

## III. CONGRESS APPROVED THE XEROX DECISION WHEN IT ENACTED THE TRADE AND TARIFF ACT OF 1984.

The legislative history requiring the broad holding of *Xerox* is not limited to the venerable history of the Warehousing Act of 1846. Within twenty-two months after *Xerox* was decided, Congress expressed its approval of this Court's holding in the *Xerox* case when it adopted the Trade and Tariff Act of 1984.[35] This Act amended the Foreign Trade Zone Act [36] to provide a statutory

[33] Dix at 792.

[34] The Senate rejected an amendment to the Bill providing that "said owner, importer, consignee, or agent, shall, at the time of entering the same for warehousing, under this act, declare in writing, which of such goods, wares, and merchandise are entered for consumption within the United States, and which for exportation to ports or places beyond the United States . . . ." Journal of the Senate, 29th Cong., 1st Sess. 406 (July 13, 1846). The House rejected an amendment that "the importer, or other persons claiming to deposite the same in any warehouse, shall first specify in any invoice of said goods . . . what portion of said goods are intended for exportation, and also what portion of said goods are intended to be withdrawn for consumption. And that no goods shall be allowed to be withdrawn from any warehouse for exportation or consumption, unless so specified as aforesaid at the time of admitting the same to the warehouse . . . ." Cong. Globe, 29th Cong., 1st Sess. 1178 (August 1, 1846). The enacted warehousing system was thus made consistent with the British warehousing system where "the election [for consumption or exportation of goods] is made on withdrawing the goods from the warehouse, and not on warehousing them." Dix at 795.

[35] Pub. L. No. 98-573, 98 Stat. 2948 (1984).

[36] Ch. 590, 48 Stat. 998 (1934), codified as amended 19 U.S.C. § 81a-u (1982). Goods imported into foreign trade zones, as in the case of customs bonded warehouses, are not subject to import duties until withdrawn for domestic consumption. 19 U.S.C. § 81c (1982). Unlike customs bonded warehouses, however, there are no separate classes of foreign trade zones, and manipulation, manufacturing and exhibition are generally permitted subject to customs supervision. 19 C.F.R. § 146.32 (1983).



exemption from state and local property taxes for imported goods held in a foreign trade zone.[37]

Congressman Wright, sponsor of H.R. 717, 98th Cong., 1st Sess. (1983), explained the rationale for the bill in testimony before the Subcommittee on Trade:

> Now, there is only one case that I am aware of anywhere in the whole United States where a local taxing authority, a local city has presumed a right to levy local ad valorem taxes on goods in foreign commerce, the inventories in the foreign trade zone, and that, as luck would have it, occurred in my district, at the Dallas-Fort Worth Foreign Trade Zone, where the city of Irving, composed of some very fine Texas citizens, simply misunderstood the nature of a foreign trade zone and undertook to levy local ad valorem taxes on all the inventories that are there in the foreign trade zones.

[37] Pub. L. No. 98-573, Sec. 231(b), 98 Stat. 2948, 2991 (1984) provides:

> (1) Section 15 of such Act of June 18, 1934 (19 U.S.C. 81o) is amended by adding at the end thereof the following new subsection:
>
> "(e) Tangible personal property imported from outside the United States and held in a zone for the purpose of storage, sale, exhibition, repackaging, assembly, distribution, sorting, grading, cleaning, mixing, display, manufacturing, or processing, and tangible personal property produced in the United States and held in a zone for exportation, either in its original form or as altered by any of the above processes, shall be exempt from State and local ad valorem taxation."
>
> (2) The amendment made by paragraph (1) shall take effect on January 1, 1983.

> Well, it occurs that *a recent Supreme Court decision in the case of Xerox versus the County of Harris already has ruled that you cannot do that with respect to a bonded warehouse, and I should think that the very same identical provision would apply here.*[38]

Senator Tower, cosponsor of S. 1411, 98th Cong., 1st Sess. (1983), a companion bill to H.R. 717, in a statement for the record, explained the rationale for the bill as follows:

> Congress created foreign trade zones to make our country competitive in the international marketplace. Local taxation of goods located in a foreign trade zone would, of course, frustrate the congressional purpose. The Federal preemption of this type of taxation has been uniformly recognized outside of Texas. However, because of restrictions in the Texas constitution, the formal recognition by the State of Texas is not possible.
>
> The lack of a definitive statute in Texas has created a hesitation among businesses that might otherwise use Texas foreign trade zones. A State statute is, of course, not necessary to restate a Federal preemption. A State statute would be merely gratuitous, to insure that local authorities comply with Federal law. Without such a statute to show local assessors, however, businesses are concerned that they will be forced to go to court in order to secure an ad valorem tax exemption to which they are entitled. *Although the recent U.S. Supreme Court case of Xerox Corporation against Harris County seems to make the state of the law clear, businesses do not like to operate based on how case law would help them if they are forced to go to court.*
>
> By simply restating *the existing Federal preemption of ad valorem taxation*, the Bentsen-Tower

[38] Certain Trade and Tariff Bills, Hearings before the Subcomm. on Trade of the House Comm. on Ways and Means, 98th Cong., 1st Sess. 330 (1983) (statement of Rep. Wright). J.S. App. H, pp. 49a-51a; emphasis supplied.



> bill would be able to facilitate the development of foreign trade zones.[39]

Further evidence that Congress intended to approve the pre-emption recognized in *Xerox* is found in H.R. Rep. No. 267, 98th Cong., 1st Sess. 35 (J.S. App. J, pp. 55a-56a), stating that "The goal of this legislation [H.R. 717] is . . . to confirm that Congress intended not to permit the imposition of [state and local ad valorem] taxes" on imported property in a foreign trade zone, and S. Rep. No. 308, 98th Cong., 1st Sess. 36 (J.S. App. K, pp. 57a-59a), stating that "The Supreme Court of the United States has ruled that Congress's comprehensive regulation of customs duties preempts state property taxes on goods stored under bond in a customs warehouse (*Xerox Corp. v. County of Harris, Texas, and City of Houston, Texas*, No. 81-1489, December 13, 1982)."

The foregoing legislative history clearly shows that Congress provided the exemption to goods stored in a foreign trade zone in order that those goods would be on a parity with imported goods stored in a customs bonded warehouse. The sponsors of the 1984 amendment acted because they knew that this Court had decided that all imported goods stored in a customs bonded warehouse were free from state and local property taxation under the *Xerox* decision. Congress considered customs bonded warehouses and foreign trade zones as separate but consistent elements of a single structure of its customs policy, a policy manifested in the exercise of its authority under the Tax and Commerce Clauses. For the Court to hold now that property stored in customs bonded warehouses and destined for domestic use is subject to state and local property taxes, while similar property

[39] 129 Cong. Rec. S7748-49 (daily ed. June 6, 1983) (statement of Sen. Tower), J.S. App. I, pp. 53a-54a; emphasis supplied; *see also* Miscellaneous Tariff Bills, 1983-84, Hearings before the Subcomm. on Int'l. Trade of the Comm. on Finance, 98th Cong., 1st Sess. 355 (1983) (statement of Sen. Tower).

with a similar destination stored in a foreign trade zone is exempt from such taxes, would stand the exemption on its head and inject the difference of treatment which Congress so clearly was trying to avoid.[40]

## IV. THE DUE PROCESS CLAUSE AND THE IMPORT-EXPORT CLAUSE PROHIBIT A STATE FROM LEVYING AN AD VALOREM PROPERTY TAX ON IMPORTED GOODS STORED IN A CUSTOMS BONDED WAREHOUSE.

Reynolds separately argued in its appeals to the courts below that the ad valorem property taxes levied on its

[40] The close relation between customs bonded warehouses and foreign trade zones is clearly shown by Treasury Decision 86-16, recently issued by the Treasury Department, and reprinted in the Customs Bulletin for March 26, 1986 (Vol. 20, No. 12) at pages 15 through 91. This extends the "audit-inspection method" used by Customs in the supervision of customs bonded warehouses to foreign trade zones. The following significant statement appears in the "Background" section of this Treasury Decision (p. 17 of the Bulletin):

> The audit-inspection program approach to administration of those areas of Customs responsibility, which de-emphasizes the physical presence of a Customs officer to supervise each transaction, was successfully implemented in regard to the operation of bonded warehouses (see T.D. 82-204, published in the Federal Register on November 1, 1982 (47 FR 49355)). Audit-inspection is a method of supervision based on spot checks and audits of foreign trade zone activities as represented in records maintained by the zone operator. This method is substituted in lieu of physical on-site supervision by Customs when merchandise is admitted to, transferred from, or processed in the zone.
>
> The principal advantage for Customs of audit-inspection is that it requires fewer Customs personnel to administer the zones. The principal advantages for the importing community are that (1) merchandise may be admitted, transferred, or processed without a Customs officer being present, allowing increased flexibility in zone opreations, and (2) for most zones, the reimbursable cost paid to Customs is reduced.



imported goods stored in customs bonded warehouses violated both the Due Process Clause and the Import-Export Clause of the United States Constitution. The North Carolina Court of Appeals denied both claims. This Court has never considered either question in a written opinion.[41]

In *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905), this Court stated that "[i]t is . . . essential to the validity . . . [of an ad valorem property] tax that the property [sought to be taxed] . . . be within the territorial jurisdiction of the taxing power." *Id.* at 204. Later, in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, *reh'g denied*, 424 U.S. 935 (1976), where no customs bonded warehouse was involved, the Court held that a "nondiscriminatory property tax" levied on goods "no longer in transit" was not proscribed by the Import-Export Clause of the United States Constitution. *Id.* at 302. Clearly, a state is without authority to levy an otherwise valid ad valorem property tax if the property sought to be taxed is not legally within the taxing "jurisdiction" or is still "in transit."

This Court has consistently recognized in prior cases that as long as imported property is stored under bond in a customs warehouse, it is outside the taxing jurisdiction of the individual states and the District of Columbia. In *Fabbri v. Murphy*, 95 U.S. 191 (1877), the Court stated that "Congress did not regard the importation as

[41] A Due Process argument was not raised in *American Smelting & Refining Co. v. County of Contra Costa*, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570 (1969), *appeal dismissed*, 396 U.S. 273, *reh'g denied*, 397 U.S. 958 (1970). Nor was a Due Process argument presented in *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982); and this Court found it "unnecessary . . . to consider" whether the Texas property tax involved in *Xerox* would "pass muster" under the Import-Export Clause. 459 U.S. at 154. An identical conclusion was stated with regard to the excise tax involved in *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 429 (1940).

complete while the goods remained in the custody of the proper officers of the customs." *Id.* at 197-198.[42]

More recently, in *Xerox Corp. v. County of Harris*, 459 U.S. 145, 153-154 (1982), this Court cited with approval the decision in *District of Columbia v. International Distributing Corp.*, 118 U.S. App. D.C. 71, 331 F.2d 817 (1964). The Court of Appeals there held that an excise tax statute should not be construed to apply to the sale to "diplomatic purchasers" of alcoholic beverages stored in a customs bonded warehouse. In reaching this conclusion, the court approved the rationale, stated by the D.C. Tax Court in its opinion, that:

> "The idea of bonded warehouses and their use by the United States custom authorities negatives the proposition that at the time of sale the alcoholic beverages were in the possession of the petitioner [the corporation]. True it is that the private bonded warehouse was physically in the District of Columbia; and the liquors were stored therein; and in that sense they were in the District. *In law, however, they were still without that jurisdiction, and did not become subject thereto until they had been withdrawn from the private bonded warehouse and removed from the control of the customs official.*"

118 U.S. App. D.C. at 73-74, 331 F.2d at 819-820; emphasis supplied. *See also Ammex Warehouse Co. v. Department of Alcoholic Beverage Control*, 224 F. Supp. 546, 555 (S.D. Cal. 1963), *aff'd*, 378 U.S. 124 (1964), holding that goods in customs bonded warehouses "never become part of the common mass of goods in the State," and *United States v. Ehrgott*, 182 F. 267, 273 (C.C. S.D. N.Y. 1910), holding that placing imported goods under customs bond is as if they were "detained at the borders."

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[42] 19 U.S.C. § 1557(a) (1982) provides that the duty owing on imported goods, when withdrawn from a customs bonded warehouse, is determined based on "the rate of duty imposed by law . . . at the date of withdrawal." This is further evidence that Congress does not regard "importation as complete" until withdrawal.



*Fabbri* and its progeny point strongly to the conclusion that the property tax in issue violates the Due Process Clause. If, as the Court noted in *Fabbri*, importation is not complete so long as imported goods remain in customs custody and if, as the Court observed in *Xerox*, imported goods are "not subject to [a state's] taxing jurisdiction until . . . removed from the [customs bonded] warehouse,"[43] then the factor "essential" to the validity of a state property tax is clearly absent. The goods have not come to rest within "the territorial jurisdiction of the taxing power." *Union Refrigerator Transit Co.*, 199 U.S. at 204.

The contention that the tax in issue also violates the Import-Export Clause is not easily isolated from the Due Process argument.

In *Michelin*, the Court found it significant to note that the property in question was "no longer in transit." 423 U.S. at 302. The Court had observed earlier in its opinion that:

> Nothing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are *no longer in import transit* was the type of exaction that was regarded as objectionable by the Framers of the Constitution.

*Id.* at 286; emphasis supplied.

The significance of these statements was confirmed in *Department of Revenue of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978). There, the Court noted that its Import-Export Clause policy analysis stated in *Michelin* might not be applicable to the question whether a property tax is proscribed

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[43] *Xerox*, 459 U.S. at 154.

when imposed on "imports . . . in transit." *Id.* at 757, n.23.[44]

In this case, it is clear under *Fabbri* that importation is not complete while the goods are still in customs custody. 95 U.S. at 197-198. Moreover, unlike the tax in the *Washington Stevedoring* case, which fell only on an activity related to imports or exports, the tax in issue here falls on goods while they are still imports in federal customs custory.[45] This makes the North Carolina tax, in substance and effect, an "Impost or Duty" which the Framers of the Constitution determined could not be exacted by one of the individual states. If *Xerox* is read to say that Congress only pre-empted state taxation of goods stored in a customs bonded warehouse awaiting reexport, then a tax levied on imported goods stored in a customs bonded warehouse awaiting either domestic use or consumption or possible reexport is clearly a tax on "imports in transit" and, as such, is prohibited by the Import-Export Clause.

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[44] In *Department of Revenue*, it was noted (435 U.S. at 762, Powell, J., concurring) that:

> In *Michelin* . . . , this Court abandoned the traditional, formalistic methods of determining the validity of state levies under the Import-Export Clause and applied a functional analysis based on the exaction's relationship to the three policies that underlie the Clause: (i) preservation of uniform federal regulation of foreign relations; (ii) protection of federal revenue derived from imports; and (iii) maintenance of harmony among the inland States and the seaboard States.

[45] It does not matter that the custody may be formal or symbolic. It is nonetheless real. Many consequences would follow from an interference with such custody, of which federal criminal liability for robbery of the warehouse, or surreptitious removal of goods from the warehouse, or fraud or breach of faith by the custodian, are obvious examples.



## CONCLUSION

The judgment of the Court below is inconsistent with the stated result in *Xerox*. It cannot be sustained under the Supremacy Clause when considered in light of the legislative history surrounding the Warehousing Act of 1846 and the Trade and Tariff Act of 1984. Moreover, imported goods stored in a customs bonded warehouse are still in transit and have not, as yet, been released into a state taxing jurisdiction. Thus, the North Carolina property tax, as applied in this case, violates the Due Process Clause and the Import-Export Clause of the United States Constitution.

The judgment below should be reversed.

Respectfully submitted,

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# APPENDICES

## APPENDIX A

## EXTRACTS FROM THE GENERAL STATUTES OF NORTH CAROLINA

### § 7A-30. Appeals of right from certain decisions of the Court of Appeals.

Except as provided in G.S. 7A-28 [exception not applicable in this case], an appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case:

(1) Which directly involves a substantial question arising under the Constitution of the United States or of this State, or

(2) In which there is a dissent.

### § 7A-31. Discretionary review by the Supreme Court.

(a) In any cause in which appeal is taken to the Court of Appeals, except a cause appealed from the North Carolina Industrial Commission, the North Carolina State Bar pursuant to G.S. 84-28, the Property Tax Commission pursuant to G.S. 105-345, the Board of State Contract Appeals pursuant to G.S. 143-135.9, or the Commissioner of Insurance pursuant to G.S. 58-9.4, or a motion for appropriate relief or valuation of exempt property pursuant to G.S. 7A-28, the Supreme Court may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals. A cause appealed to the Court of Appeals from any of the administrative bodies listed in the preceding sentence may be certified in similar fashion, but only after determination of the cause in the Court of Appeals. The effect of such certification is to transfer the cause from the Court of Appeals to the Supreme Court for review by the Supreme Court. If the

cause is certified for transfer to the Supreme Court before its determination in the Court of Appeals, review is not had in the Court of Appeals but the cause is forthwith transferred for review in the first instance by the Supreme Court. If the cause is certified for transfer to the Supreme Court after its determination by the Court of Appeals, the Supreme Court reviews the decision of the Court of Appeals.

Except in motions within the purview of G.S. 7A-28, the State may move for certification for review of any criminal cause, but only after determination of the cause by the Court of Appeals.

(b) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court before determination of the cause by the Court of Appeals when in the opinion of the Supreme Court:

(1) The subject matter of the appeal has significant public interest, or

(2) The cause involves legal principles of major significance to the jurisprudence of the State, or

(3) Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm, or

(4) The work load of the courts of the appellate division is such that the expeditious administration of justice requires certification.

(c) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the Supreme Court:

(1) The subject matter of the appeal has significant public interest, or



(2) The cause involves legal principles of major significance to the jurisprudence of the State, or

(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

(d) The procedure for certification by the Supreme Court on its own motion, or upon petition of a party, shall be prescribed by rule of the Supreme Court.

## APPENDIX B

## FULL TEXT OF HOUSE COMMITTEE REPORT ON WAREHOUSING BILL (1846)

29th CONGRESS, 1*st Session.* — HO. OF REPS.

Rep. No. 411.

### WAREHOUSING IMPORTS.

[To accompany bill H.R. No. 275]

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March 10, 1846.

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Mr. SIMPSON, from the Committee on Commerce, made the following

REPORT:

*The Committee on Commerce, to whom were referred the several memorials and petitions, from different parts of the Union, praying the establishment of a warehousing system, report:*

From the earnest recommendations of our Presidents, treasury officers, and chambers of commerce, as well as other memorialists, the committee are induced to look on this system as of great importance to the commerce of the Union; and in subdividing the various matters referred to the committee, this subject was referred to a sub-committee, consisting of Mr. Lawrence, of New York, Mr. Grinnell, of Massachusetts, and myself, to investigate it and report a bill.

I feel it due to them to state, that to their practical knowledge of the subject of commerce, and their cheerful co-operation, together with information sought from other sources, I am indebted, not only for an insight to



the vastness of the subject, but for the details of the bill. I claim, therefore, for this report and bill, nothing beyond the arrangement of the facts and the deductions from them.

Previous to the 1st of July, 1842, the laws of the United States permitted imports to be sold on a credit for the duty—extending at different times from three months to one or more years, except certain classes of imports which were required to pay the duty in cash. At that time the tariff had come down to an average of 20 per centum or less, and then the payment of duties in cash was required on all imports.

In the August following, the tariff was increased to an average of 40 per centum, as by some asserted, and imposed on many articles before free, which made it necessary to pay double the amount before paid on the articles taxed, and an equal duty on many articles before free.

This tax, by the laws now in force, the importer has to pay in cash when landing his imports, on the whole cargo at once. And if any of the cargo is intended for exportation, the duty paid thereon must remain deposited in collectors' hands until a bond is given that the proof will be brought back that the imports have been landed in a foreign port, and then the duty paid is refunded him as a drawback.

From July, 1842, these burdens and restrictions have been considered severe and injurious, as well to trade as the importer, and hence the general call for a remedy.

2] The requirement of the duties in cash is, when accompanied with other suitable regulations, a good requirement, and, at the time it was adopted, probably a necessary one to secure the safe collection of the revenue, for which alone it was adopted. But the system on which it was engrafted was not adapted to it, and it has worked

badly. And although it has given to the collection of the revenue reasonable security; it has sacrificed other interests.

The following are some of its prominent evils:

1st. It requires importers to pay, on landing his imports, all the duty on the entire importation, although a part may be intended for exportation. From which a loss results to the importer of the interest on the capital advanced to pay the duty on his goods exported; from which, also, the prices of imports are increased to consumers to the amount of the per centum on the duty paid, and charged double by importer and merchant, and caused by obliging the importer to pay the duty. This per centum on the last year's duties was over $3,000,000.

2d. It lessens the carrying trade, prevents competition, and throws imports into the hands of capitalists, and mostly foreigners. This is an injury to ship-owners, ship-builders, lessens the demand for seamen; hence destroys the nursery for the navy. And it also increases the tax on the producer and consumer by increasing freight. Half a cent reduction in the freight of last year's cotton crop would have saved the planters $4,313,636; other productions in the same proportion.

By this bill the revenue will be collected with equal security, greater facility, and the losses resulting to the consumer from the cash duties be saved.

By the warehousing system, is meant a permission by law to importers to deposite imports in suitable houses under the key of the collector of the port, for any term not exceeding three years, without the payment of any duty; also, permission to withdraw any part or the whole at any time during the three years, for exportation or transfer to any other port in the United States, without payment of any duty. At any port, any part or the



whole on paying the duty, may be withdrawn for consumption.

As this subject never has been legislated on by Congress, and as the present object is to unfetter commerce as much as is compatible with security to the revenue, the committee have endeavored to make the bill as perfect as possible, with a view to the revenue, and for that purpose have sought information from all quarters, and finally submitted it, to be perfected in details, to the Comptroller of the Treasury.

The bill provides as follows:

Sec. 1. That importer may deposite his imports in the custom or other house free of duty for three years, under the key of collector, and give bond, also, in the value of the imports.

Sec. 2. That he shall have first complied with the legal requirements.

Sec. 3. That importer may withdraw a part or the whole for consumption, on paying duty and charges.

Sec. 4. That importer may withdraw a part or the whole for exportation, on paying storage and giving bond that these exports shall be landed abroad.

Sec. 5. That importer may withdraw a part or the whole for transfer to another port of entry. After entry in the custom-house there, he may, in like manner as at the first port, withdraw for export or consumption, or to transfer again to any other port of entry.

[3] Sec. 6. When and how the importer's bond shall be discharged.

Sec. 7. That importer, when his imports arrive at the second port, after complying with all the requisites of the warehousing law, except carting his imports to the warehouse, may, from the wharf, enter them for consumption, exportation, or transfer to another port.

Sec. 8. Permits collector to use custom-house for warehouse, or importer may furnish one.

Sec. 9. That imports warehoused, that are embezzled, shall be forfeited, and the embezzler fined $1,000.

Sec. 10. That owner of a vessel with imports on board, not entered by the owner of the goods in five days, the captain of the vessel may warehouse them.

Sec. 11. Collector is required to sell at auction all imports under former acts and duties not paid in ninety days, and make return thereof to the treasury.

Sec. 12. Collector is directed to sell and return in same manner all imports warehoused under this act left unpaid for at the end of three years from entry.

Sec. 13. Collector is directed to sell imports warehoused in a rotting or decaying condition, and make same return.

14. Directs that this act shall go into effect in sixty days after approval, and directs the Secretary of the Treasury to make necessary regulations to carry it into effect.

Sec. 15. Repealing clause.

If this bill be adopted, it will reinstate the sound though long neglected maxim of Adam Smith, "That every tax ought to be levied at the time and in the manner most convenient for the contributor to pay it;" because it provides that the tax shall only be paid when the imports are entered for consumption, and may be paid at any port in the United States the purchaser may prefer.

It will relieve the importer from the necessity of keeping on hand surplus capital to pay the duties in advance, and to make a deposite for the duties on imports intended for exports. This is an important change for the importer and the consumer. By the treasury report, the



imports of last year exported amounted to $15,346,830; the duties on this, say at 33⅓ per cent, is $5,115,610. It is not unfair to presume this sum laid in deposite in all six months. The interest on this sum, at 6 per cent., is $153,468, which is a loss to the importer.

By the present mode of collecting the revenue, the importer pays the tax on all his imports at once, which adds to what his imports cost him, and puts his per cent. on the whole when he sells. Thus, then, the tax and the per cent. put on it by the importer make a part of the cost to the retail merchant; and he, in like manner, when he sells to the consumer, puts his per cent. on the whole amount of the cost to him. In this manner, the consumer, who buys from the merchant, not only has to pay the tax, but the per cent. on that tax *twice*. By the Treasurer's report, the amount received from customs for last year was $27,528,112. Importers' per cent. on this sum, at 12 per cent., is $3,303,373. On this sum the merchant puts his per cent., (say 20,) which amounts to $666,674; which, added together, makes $3,970,047, which by this bill is saved to the consumer thus: the bill provides that the retail merchant at New Orleans or Detroit, or any other port of entry, may buy imports warehoused at New York, [4] transfer them to New Orleans, and pay the duty for them there. As the importer does not pay the tax, of course he does not charge a per cent. on it, nor will the retail merchant. This exaction from the consumer is the result of the bad working of the present mode of collection of the revenue. This is not all; imports are usually made in large packages for each article. The importer sells in unbroken packages to the jobber or wholesale merchant; he divides and assorts to suit the retail merchant, and he to the consumer.

All over the first per cent. paid on the tax is saved to the consumer by allowing the retail merchant to pay it directly to the government himself. And what is paid is thus distributed all over the Union—received in driblets

from all the ports; thereby adding security to the government in its collections, as well as convenience to the parties paying it. And what is still more important, it adds great facility and cheapness in paying the debts of the government to the distant parts of the Union and the Indian tribes, and will materially lessen if not entirely eradicate the thousand evils entailed on the country by the government making any one place the focus of its revenue and wealth. Now, fifteen or twenty millions of the revenue is collected in New York, not exceeding two millions of which is paid there for dues to the State. The balance has to be sent to pay debts in all parts of the country, and to the Indians, at expense and risk. With ports of entry all up the Mississippi, Red river, and round the lake border, the revenue on all imports consumed around them would be paid to the collectors at those places. The money would be collected on the spot where the debt is owing, and would be paid out there. And thousands of public debts would be received and paid without counting a dollar. Example: government owes A $100 as a mail carrier; A owes merchant B store account, $100; B owes government $100, revenue on imports that he has bought: exchange receipts, and the accounts are all paid. It takes away from large capitalists (and, as is said, mostly foreigners, because interest is lower abroad than here) the monopoly, and invites rising, thrifty, energetic merchants of smaller capital into the competition. Another consideration not to be lost sight of, is the supply these warehouses would afford in the event of war.

But it is the influence on trade and its dependencies, which gives to this bill its greater importance. It is well known that the government looks to the seamen engaged in the fisheries and the merchant service for sailors to man our ships of war. And it is equally well known that to them we are indebted for all the naval character we possess. Whatever tends to throw importations in the hands of foreigners, necessarily throws that trade in



foreign bottoms. This lessens the use of our vessels, reduces the demand for ship builders and also for seamen, and disables the government in time of need to man her fleets with hardy crews, trained to the management of their vessels, and accustomed to the element of their choice.

Besides the trade from England and her dependencies, which the present unwise restrictions on trade have thrown into her bottoms, the hold on the carrying trade of the immense country south of us, which we once had, we are daily losing. The vast countries lying south of us and around to California, studded as that immense coast is with islands capable of producing a rich and abundant harvest for commerce, though young and not half explored, open a vast field for enterprise and trade, which has not only attracted the attention of this country, but of the civilized and commercial [5] world. China, too, lies just beyond. Both these, the youthful and the aged, have, to a very limited extent, engaged in navigation. Peopled as these islands and countries are, by a variety of nations, producing and requiring a variety of the productions and manufacturers, the warehousing system is demanded here to furnish that varied assortment. We, too, situated in their neighborhood, and on the pathway to Europe, have extraordinary advantages to command that trade. That the warehousing system would give it to our enterprising merchants, your committee fully believe. An English writer, speaking of the effects of the warehousing system in Great Britain, says: "It is not difficult to understand its object, and it must strike every one who studies it as a remarkable evidence of the sagacity and political skill of the nation that has invented it. The growing importance of the South American States in the circle of commerce, has been a leading inducement to the establishment of this system. These States, with a small and inadequate commercial marine, with the most abundant supplies of the great staples of trade, and with a growing

population disposed to consume British manufactures, have been drawn by the warehousing system to pour their rich redundance into the lap of England. The system first invites the importation of these products into the English ports, selects so much of them as is required for home consumption, and then leaves to British trade the distribution of the surplus over the whole of Europe. England sits advantageously for this trade, at the gate of the commerce of the continent, and has wisely erected the storehouse at which every customer may be properly supplied. Indeed, it is everywhere conspicuous in the history and characteristics of this warehouse system, that its chief object is to secure to British commerce as much as possible of the productions of the territories and colonies, and other nations."

The English warehouse system here alluded to was partially established in 1803, enlarged occasionally, and finally perfected in 1833. In 1841 it was extended to ninety ports, and places contiguous to ports. And the privilege is now extended to Halifax, Quebec, Montreal, Hamilton, Kingston, and Toronto, in Canada.

Another English writer says: "At the commencement, it (the warehousing system) was limited in its operations to a few of the principal ports, and extended to certain articles only. The greatest advantages have been derived from its adoption, not only to the merchant individually, but to the nation, as it has been the means of diffusing its benefits throughout the United Kingdom."

Commendations like these, which carry along with them the internal evidence of practical experience, should not be, nor have they been, lost on us; for, although not so universally engaged in commerce as they, the advantages of this system have long been seen by many enlightened and practical men among us. As early as 1816, Mr. Dallas, then Secretary of the Treasury, presented it to Congress; and the subject has been favorably entertained



by most, if not all of his successors, and by various committees of Congress to whom this subject has been referred.

But interests which it has been imagined this system is inimical to, have thus far successfully opposed its adoption. And your committee, legislating for the Union, would not willingly inflict an injury on a particular section, even for a general good. But commerce benefits all, just in proportion to its freedom. Fasten the tourniquet on the arm, and the hand perishes; loose it and the heart sends the blood to the fingers, reanimates, and invigorates [6] again. Commerce is to the whole human family, what the heart is to the animal system; restrict it, and the part affected languishes or dies, as the restriction may be partial or complete; unfetter it, and the entire human family are invigorated, blessed, and beautified.

In addition to this, it has long been a fruitful source of complaint with our manufacturers that foreign goods were thrown into our markets and forced off below remunerating prices, to the utter ruin of the sales of American goods of the same description. That this does occur, in consequence of an undue accumulation in the hands of the foreign manufacturer of particular descriptions of goods, which are sent here to seek a market, there can be no doubt. Under the operation of this system, these goods, instead of being forced on the market to its extreme depression, to raise the means of refunding the duties, will be deposited until a market is found not overstocked with goods of this description; thus relieving our manufacturers from the undue depression of their fabrics, the importer from the loss arising from such forced sales, adding materially to the regularity and stability of prices, and, in a degree, preventing those tremendous revulsions in commerce which have so recently shrouded our country in gloom.

The manufacturer will also be benefited by the increased demand for his fabrics, arising from the natural

increase of trade. The facilities offered by this system for an accumulation of the *manufactures* of the *world*, will necessarily call to our ports those who wish to collect *assorted cargoes* for the Pacific or Indian ocean. A part of every cargo of this kind will be *American fabrics;* and this trade *alone* would benefit our manufacturers *more* than all the real injury from this system that can be conjured up by the most prolific fancy. Besides, it is said English manufacturers approve the system.

All the benefits of the English system spoken of in the above extracts from English writers, if this bill be adopted, would be ours; the southern trade would be in our bottoms, the assortment would be kept in our warehouses, and the world might be furnished from the American continent.

Next to merchants, shippers, &c., the cultivators of the soil—the producers of the great necessaries of life—would receive an immense pecuniary advantage from this system, in the reductions of freight. Mr. Phoenix, of New York, in his excellent report from the Committee on Commerce, in 1844, and from which I have drawn much valuable information, says: "At present our imports from Europe, being entirely for the supply of this country, and comparatively of small bulk, are hardly sufficient to fill the reguar packets; which, being faster sailers, are preferred for this purpose to the freighting ships. Our exports, on the other hand, consisting of cotton, rice, tobacco, flour, corn-beef, and pork, of great bulk and weight, require an immense amount of shipping to transport them. And as our numerous freighting ships can obtain but little homeward cargo, (returning generally with the ballast they took out,) the expense of the whole voyage must be defrayed by the outward cargo. The rate of freight, therefore, becomes an important item. The freight on cotton to Europe varies from one to two cents per pound. A difference of half a cent forms an important per centage on an article worth from four to seven; and



it follows that a rise in freight operates as so much loss to the planter. Any system, therefore, that would enable the ship owner, by a homeward freight, to take his outward cargo at a lower rate, or increase the number of his voyages, would benefit the producer. A cargo [7] of cotton requires heavy ballast, and if the warehouse system were established," our southern depots would soon be filled with tobacco, rice, beef, flour, &c., and sugar from Cuba and the West Indies, "to serve as well for ballast as part of the cargoes for many of the cotton voyages to those ports in Europe where all these articles are in demand." "In the West India and South American trade they are unable to procure full freight for European markets; but being ballasted with heavy articles, the produce of those countries, it would be convenient to call at our ports and take a top load of cotton. In this manner further competition would be produced in the carrying trade, which would be followed by a reduction of freight."

"By the treasury report, in the year 1845, $51,739,643 of cotton was exported, which, at six cents per pound, makes 8,623,273 pounds; half a cent on the freight of this is $4,313,636, which would be saved to the planter. In the same proportion would the tobacco, rice, beef, pork, flour, and corn raisers be benefited."

In conclusion, your committee will observe that although the warehouse system benefits any country, yet there are but few points where its richest blessings would be realized. These points must depend on geographical position, population, and products combined. They are combined here. England has her advantages. She has manufactures and population, and a geographical position good, but not excellent. And wisely has she made the most of it, by erecting the storehouse in advance, and conducting all the avenues of trade to it. Our population, though not now equal to hers, will soon be greater; our productions superior, because, by habit, they have become necessaries of life; and our geographic position excellent.

Standing as it does on the broadside of a great continent, facing an open sea, on the pathway from all South America to Europe, and from Europe to China, it is *our* "warehouse would set advantageously at the gate of the commerce of the continent," and "in our lap their rich redundance would be laid."

My pursuits, connected with ploughing the soil and not the ocean, have kept out of view more than a glimpse of the beauty and extent of this subject; nor have I been apprized of the treasures of intellect and wealth the extension of foreign commerce would add to our prosperity and happiness as a nation.

From those, therefore, similarly situated, I bespeak a full examination, not of the report but the subject; believing its great advantages to us to depend on being rightly understood here, and legislated on solely with a view to unfetter it; leaving the seas as He who made them evidently intended—a highway for all—over whose bosom the productions of our climate shall be freely exchanged for another, and thus make commerce as it should be, a bond of peace to mankind.



## APPENDIX C

## EXTRACTS FROM SPEECHES OF SENATOR DIX, OF NEW YORK (1846)

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Congressional Globe, 29th Congress, 1st Session
pp. 789-792

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### THE WAREHOUSE BILL.

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### SPEECH OF MR. DIX,

OF NEW YORK,

IN THE SENATE, *June* 19, 1846.

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In explanation of the Warehouse Bill.

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The tariff act of 1842 introduced the most thorough revolution in this department of the revenue system of the United States which has been known since the foundation of the Government, by abandoning the old plan of giving credit for duties, and requiring them to be paid in cash for the largest as well as the smallest sums. The old system gave a credit for duties, without exacting interest during the period for which the credit was granted. Under the act of 1842, if there is a failure or an omission to pay the duties on imported merchandise on the completion of the entry, interest is charged from the day the duties accrue, and the importer pays it with the duties when he claims the goods; or if, in default of voluntary payment by the importer, a sale takes place,

the interest is added to the duties, and the amount, together with the charges for storage, &ec., is realized from the proceeds of the sale.

I desire to say here, Mr. President, to avoid misapprehension, that I am aware of the provision in the tariff act of 1833, or the Compromise act, as it is called, requiring duties to be paid in ready money; but this provision did not go into effect until the 1st of July, 1842; and by the same act all duties were reduced to 20 per cent. on the same day, while the more liberal provisions of the act of 1799, in respect to the storage of goods, if I am not mistaken, remained in force. I also desire to say that I have not overlooked the partial provision in the act of 1832, requiring duties on woollens to be paid in cash, or, if stored, exacting interest on the duties.

The introduction of cash payments for duties, though I believe it is generally conceded to have operated favorably as far as the Government is concerned, so much so that few, if any, are desirous of disturbing it, at least by reinstating the old system of credits, bears heavily on the mercantile interest in comparison with the latter. The forebearance of payment by the Government was, in practice, equivalent to a cash capital for the merchant to the amount of the duties during the time for which the credit or forbearance of payment was granted. It was, unquestionably, a valuable mercantile facility for those who had the benefit of it, and the discretion to employ it judiciously. But it had its public inconveniences, and it was very properly abolished. It was, however, foreseen and foretold at the time the change was made, that great hardship would be likely to result from it, unless provision was made for storing goods for a limited period, and forebearing during that period to exact the payment of the duties. But it is a singular fact, and one which is not easily to be accounted for on any principle of public utility or convenience, that when the extraordinary and violent transition took place from



credits to cash payments, the maximum time during which merchandise was allowed to remain in store, before a sale to realize the duties, instead of being enlarged, as one would suppose it should have been, or at least continued as it then existed, was actually reduced, as has been seen, from nine months to one-third of that period, and for most merchandise to a still shorter time. The change took place, too, at the very moment when the rates of duty were enormously increased on a large class of imports from 20 per cent., the maximum under the Compromise act of 1833. The stringent measure of cash payment was rendered more stringent by a simultaneous increase of the rates of duty, and by depriving the importer, to a great extent, of the facility of placing his goods in store, if the importation should find him unprepared to pay the duties in cash. This privilege, which, under the system of credits, was of no great practical benefit in extensive operations, would, under the system of cash payments, have been a facility of considerable value to importers of moderate means, and would have enabled them to contend, in a limited field, at least, with large capitalists, who, if general opinion be true, have now engrossed, in a great measure, the business of importation, and will continue to do so, under existing laws, from their ability to furnish readily the means of meeting the payment of duties in cash on large cargoes. Still, if the time allowed for merchandise to remain in store under the act of 1799 had not been diminished, it would have been too limited to accomplish all the objects anticipated from a warehousing system, especially so far as such a system may lead to the storage of goods for exportation.

* * * *

[792] The first and greatest benefit to the commercial interest is the relief it will afford from the present system of exacting the payment of duties in cash, on the completion of the entry of merchandise. In one sense it may be

contended, when compared with the present system, that it is an extension of a credit to the importer for the duties until he can effect a sale of his goods. Strictly speaking, it is but abstaining from an unreasonable exaction; and it is divested of all risk to the public, as the goods will never be permitted to go into the possession of the owner until the duties are paid. It will relieve him from the great hardship, which is common under the present system, of being forced to sell a portion of his goods, and sometimes in an overstocked market, for the purpose of raising the money to pay the duties. It will enable him to pay the duties as he has the opportunity of disposing of his goods for consumption, instead of being compelled to borrow money, or sell his merchandise at a loss, to raise it; and it will enable men of moderate means to enter into competition with large capitalists, who, as I have already said, monopolize to a great extent the business of importation, through their ability to command money to meet the payment of duties in cash. The proposed change is entirely consistent with the principle and the object of cash payments; and by preventing forced sales of goods to raise money for the payment of duties, it will often avoid an overstock of the domestic market with foreign merchandise, to the prejudice of the importer by compelling him to sacrifice his property, and of the producer of domestic goods of like character, by depressing prices. If we consider also that it will be likely to enlarge the circle of competition in the business of importation—not to augment the aggregate amount of imports for consumption, but to divide it among a greater number of persons—it will not be difficult to perceive that the mercantile interest must be greatly benefited by the change.

The second benefit, though perhaps not second in importance, to be anticipated from the proposed measure, is the stimulus it will be likely to give to the carrying trade, by making our ports of entry *entrepots* for the productions of all countries. Under the present system, if



imported merchandise is entered for exportation, the duties are not refunded until after the exportation has actually taken place. Thus, if an importer, having brought merchandise into the country for the domestic market, and having paid the duties, finds at the end of one, two, or three years, no demand for it at home, and is compelled to reexport it, he will have lost during that period the use of the money he has paid for the duties, and he is taxed in addition two and a half per cent. on the whole amount so paid as a premium to the Government for the privilege of sending his goods to a foreign market. No better scheme could be devised either to glut the domestic market by forcing the importer to throw his merchandise into it at any price it will command, or, on the other, to discourage navigation by taxing the reexportation of foreign merchandise, which is not wanted at home. Under the proposed plan, foreign merchandise will be allowed to be freely deposited in store, and to be reexported as freely, with no other imposition than the payment of actual expenses of storage, &c. One of the certain consequences of such a system must be to accumulate in our maritime towns a variety of the products of other countries, where our vessels can make up assorted cargoes for foreign markets. This facility has led to the deposite in British ports of merchandise designed for re-shipment to the southern portions of this continent, and, indeed, to all quarters of the globe. The value of foreign merchandise deposited in the warehouses of Great Britain is estimated at two hundred and fifty millions of dollars. The proposed plan would have the same result here, if like effects are to be expected from like causes. The deposite of even a considerable portion of such a quantity in value, made up, as much of it doubtless would be, of goods suitable to the South American and Pacific markets, could not fail to benefit and extend our navigating interest—one of the most valuable in peace, and the most important of all others to so commercial a community as the United States as a means of

defence in war. That our carrying trade would be vastly increased; that shipbuilding would be stimulated; that many foreign markets would be supplied, wholly or in part, by us with merchandise now furnished from the warehouses of Europe; that the industry of our seaports would be pu' in greater activity; that the commercial transactions of the country would be facilitated; and that a healthier competition would be created in the business of importation, can hardly be doubted. Such, at least, is the opinion of the mercantile community; and so believing, it is natural that they should look with great interest to the concurrence of the Senate in a measure which appears to them so intimately connected with the prosperity of the country.

And finally, Mr. President, if uniform prices and steady markets are, as we are taught to believe, advantageous to the producing classes, the manufacturing interest, next to the commercial, is likely to be most benefited by the proposed measure, through supplies of merchandise near at hand, ready to meet sudden and unusual demands, thus preventing a transient scarcity from becoming the basis of speculation, and furnishing an additional safeguard against those derangements which are always the most injurious to steady industry.

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Congressional Globe, 29th Congress, 1st Session,
pp. 792-793

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## THE WAREHOUSE BILL.

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### SPEECH OF MR. DIX,

OF NEW YORK,

IN THE SENATE, *July* 9, 1846.

The Warehouse bill being under consideration, Mr. DIX addressed the Senate as follows:

* * * *

[793] It has been stated, also, that on depositing goods in the British warehouses the owner is required to declare whether he deposites them for consumption or exportation, and that the goods are governed by this declaration. Sir, my investigations have led me to an entirely different conclusion. I find no such restriction, except in a special case, which confirms my inference as to the general rule. I proceed to state the result of my examinations. No declaration is required when merchandise is warehoused, whether it is for exportation or home consumption, unless it is merchandise which cannot be imported for home use. In this case, the importer must declare that he enters it for exportation, and the package is marked "exportation." This seems to be the only case in which a declaration is required on warehousing merchandise. The proof is as follows:

1. The law requires a declaration to be made in this special case. It requires none in any other case. The omission in general to require a declaration, and the

exaction of one in the special case, are conclusive proof that none is required except in the special case.

2. The form of the bond, when a bond is required, seems to prove it. The condition of the bond is for the payment of the full duties of importation or for the due exportation of the merchandise.—(*Yearly Journal of Trade*, 1845, *page* 259.)

3. It appears (see commissioner's order of 1834) that it is the practice in London, "where a part of the original importation has been exported, and a portion entered for home consumption," to charge the duty on a proportionate part, &c. This seems to show that when goods have been warehoused, a part may be exported and a part entered for home consumption. Though not conclusive, it raises the strongest possible presumption that no declaration is required on warehousing.—(*Id. page* 251.)

4. No goods which have been warehoused can be taken out, "except upon due entry" "for exportation, or upon due entry and payment of the full duties payable thereto for home use." This shows that the election is made on withdrawing the goods from warehouses, and not on warehousing them.—(*Id.*)

Sir, it is extremely unpleasant, to say nothing of the labor, to be compelled to go into this extended examination to show the erroneousness of statements made by gentlemen, whose great respectability is vouched by the Senator from Connecticut—statements made, according to their own representations, after careful inquiry. I will not assert that they are wrong. I do not deal in assertions. I give only the result of my researchers into the regulations of the system, citing my authorities and leaving to the better judgment of the Senate to correct my conclusions, if they are erroneous. I state the result thus:

1. All goods of all descriptions, which may be legally imported into the kingdom, may be warehoused, except the enumerated articles before mentioned.



2. Goods prohibited to be imported for home use may be imported, even in foreign vessels, and warehoused for exportation.

3. All other goods, excepting those comprehended in the two foregoing classes, may be imported and warehoused, either for home consumption or exportation, without any declaration, at the time of the entry, whether they are intended for one or the other.

4. The goods which may be so warehoused without a declaration include foreign manufactures.

Such I understand to be the British warehouse system. I have stated the facts above presented on no authority of individuals. I do not regard such testimony as legitimate in the decision of questions of legal enactment or regulation. I have sought for my authority in the laws and statistics of the British empire. If I have misunderstood them, it has been from putting an erroneous construction on the data from which my conclusions are drawn—data of the highest authenticity.*

* * * *

* These conclusions were drawn from the statute of the 3 and 4 William IV. It appears that the laws in relation to warehousing were consolidated in the year 1815; but no material alterations were made in them—nothing as to render necessary any modification of the views herein contained.

# APPELLEE'S

# BRIEF

Nos. 85-1021 and 85-1023

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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R. J. REYNOLDS TOBACCO COMPANY,
*Appellant,*

v.

DURHAM COUNTY, NORTH CAROLINA, *et al.*,
*Appellees.*

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**On Appeals from the Supreme Court of North Carolina and the North Carolina Court of Appeals**

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## BRIEF FOR APPELLEES

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## QUESTIONS PRESENTED

1. Whether a nondiscriminatory *ad valorem* property tax on imported goods stored in customs bonded warehouses which receive local government protection, services and benefits violates the Due Process Clause of the Fourteenth Amendment.

2. Whether a nondiscriminatory *ad valorem* property tax on imported goods stored in customs bonded warehouses and ultimately used for manufacture within the jurisdiction of the taxing authority violates the Import-Export Clause of the United States Constitution.

3. Whether Congress clearly intended to preclude state and local governments from levying a nondiscriminatory *ad valorem* property tax on foreign grown tobacco stored in customs bonded warehouses and intended solely for manufacture and sale in the United States.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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Nos. 85-1021 and 85-1022

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R. J. REYNOLDS TOBACCO COMPANY,
*Appellant,*

v.

DURHAM COUNTY, NORTH CAROLINA, *et al.*,
*Appellees.*

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**On Appeals from the Supreme Court of North Carolina and the North Carolina Court of Appeals**

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## BRIEF FOR APPELLEES

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## DECISIONS BELOW

The Judgment of the Supreme Court of North Carolina Dismissing Appeal and Denying Petition for Discretionary Review (J.S. App. 1a-2a) is reported at 314 N.C. 540, 335 S.E.2d 21. The Opinion of the North Carolina Court of Appeals (J.S. App. 5a-19a) is reported at 73 N.C. App. 475, 326 S.E.2d 911. The Final Decision of the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review (J.S. App. 21a-37a) is unreported.

## JURISDICTION

The judgment of the North Carolina Court of Appeals was entered on April 8, 1985. J.S. App. 3a. The judgment of the Supreme Court of North Carolina, dismissing an appeal and denying a petition for discretionary review, was entered on October 2, 1985. J.S. App. 1a-2a.

A notice of appeal from the judgment of the Supreme Court of North Carolina, J.S. App. 39a, was filed in that court on November 14, 1985. A copy of that notice of appeal was filed in the North Carolina Court of Appeals on that same day. A notice of appeal from the judgment of the North Carolina Court of Appeals also was filed in that Court on November 14, 1985. J.S. App. 41a. Jurisdiction over both appeals is invoked pursuant to 28 U.S.C. § 1257(2). In response to the jurisdictional statement, this Court postponed consideration of the question of jurisdiction. As we demonstrate in Part I of the Argument, *infra*, this case is not properly before the Court on appeal. Jurisdiction thus should be invoked, if at all, pursuant to 28 U.S.C. § 1257(3).

## STATEMENT OF THE CASE

1. R.J. Reynolds Tobacco Company's principal offices and only manufacturing facilities are located in Winston-Salem, North Carolina. J.S. App. 6a, 26a, 28a; J.A. 56. At those facilities Reynolds blends into its finished tobacco products tobacco grown in the United States and in foreign countries. J.S. App. 6a, 26a, 31a. Prior to manufacture, all of its tobacco is stored in the cities of Durham, Kernersville, and Winston-Salem, in warehouses privately owned and operated by Reynolds.[1] Storage of both domestic and foreign tobacco normally lasts for about two years to permit proper aging, although a very small

[1] Durham is in Durham County, and Winston-Salem and Kernersville are in Forsyth County. The two counties are approximately 65 miles apart. It is these two counties and three cities whose taxes are at issue.



amount of the imported tobacco is ready for immediate use. *Id.* at 31a; J.A. 74, 82. The imported tobacco is stored in warehouses separate from the domestic tobacco only because federal law permits deferral of the payment of federal import duties for up to five years on imported tobacco stored in a customs bonded warehouse. 19 U.S.C. § 1555 *et seq.*; J.S. App. 32a.

Physically, there is no difference between the bonded warehouses and those in which Reynolds stores its domestic tobacco; they are just ordinary warehouses. J.A. 90. All are owned, maintained and used solely by Reynolds, at its own expense. J.A. App. 30a.[2]

The tobacco remains in Reynolds' exclusive physical control inside its warehouse until Reynolds withdraws it for use in the manufacturing process. J.S. App. 30a, 32a; J.A. 77. The imported tobacco is afforded the same county and city services, including fire and police protection, as the domestic tobacco. J.S. App. 32a.[3]

[2] Reynolds' warehousing system is an integral part of its tobacco manufacturing process. Of the warehouses located in the two counties, Reynolds has 88 customs bonded warehouses (26 in Durham County and 62 in Forsyth) designated by the Customs Service as Class 8 and two Class 2 customs bonded warehouses (both in Forsyth). J.S. App. 30a. The Class 8 warehouses are for cleaning, sorting, repacking or otherwise changing in condition the imported tobacco. J.A. 60-61; J.S. App. 30a. *See* 19 C.F.R § 19.1(a)(8). The Class 2 warehouses are storage facilities into which the tobacco is moved when it is ready for manufacture. *See* 19 C.F.R. § 19.1(a)(2).

Shortly before manufacture, the tobacco is removed from a Class 8 warehouse to one of two Class 2 "areas" within Reynolds' manufacturing plant. J.S. App. 30a. On one side of a painted line on the floor is the Class 2 area. J.A. 90. When duties are paid the tobacco is moved across the line from the Class 2 area into the manufacturing process. *Ibid.* There is absolutely no difference between the customs bonded warehouses and the warehouses used for storage of domestic tobacco. J.A. 90.

[3] The value of the imported tobacco was 42% of the value of all Reynolds' real and personal property in Forsyth County in 1983. J.A. 88. Services provided by the counties and cities from revenues

"Bonding" for federal law purposes simply means that Reynolds pays a premium to a private surety company "to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse." 19 U.S.C. § 1555; J.S. App. 61a. In other words, the bond guarantees that the importer will pay any customs duty owing at the appropriate time. Reynolds can remove the imported tobacco from bonded storage anytime it desires in order to supply its manufacturing needs, once it pays the applicable duties. J.S. App. 7a, 32a; J.A. 61-62.

Within at most two weeks after payment of duty and removal from the warehouse, the imported tobacco is blended with domestic tobacco and manufactured by Reynolds into finished products. J.S. App. 31a. No more than 30 days after manufacture, the finished tobacco products are shipped from Forsyth County to domestic markets. *Id.* All raw tobacco stored in Forsyth and Durham Counties is manufactured into a finished product in Winston-Salem, the location of Reynolds' *only manufacturing facilities.* J.S. App. 31a; J.A. 56. The raw tobacco is thus Reynolds' business inventory.

Notwithstanding the implication in the appellant's brief (at 14) concerning the hypothetical shipment of tobacco by Reynolds to a foreign country for manufacture, that has never happened. The undisputed finding of fact based on undisputed evidence in the record is that "[n]*one* of the imported tobacco in bonded storage *was being held for export by Reynolds.*" J.S. App. 32a (emphasis

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derived from the property tax include: public education, social services, public health services, fire protection, emergency medical services, law enforcement, courthouse and jail facilities, water, sewer and street services, planning and zoning, library services, urban development, historic preservation, public records, environmental protection, agricultural services, flood control and erosion and sedimentation control.



added).[4] Import duties have been or will be paid on *all* of the tobacco stored by Reynolds which the cities and counties taxed for the years at issue in this case. J.S. App. 32a. These duties total 42-48 million dollars. J.A. 80; J.S. App. 32a.

2. Local property taxation in North Carolina is regulated entirely by a state statute known as the Machinery Act.[5] The North Carolina property tax is *ad valorem*, and the tax rate is assessed on the fair-market value of the property. N.C. Gen. Stat. § 105-283; N.C. Gen. Stat. § 105-347. The classification of property for taxation and the purposes for which the property tax is levied must be uniformly applicable within each unit of local government and throughout the State. Constitution of North Carolina, Article V, Sec. 2 (1868, as amended). Counties and municipalities are authorized to levy and collect property taxes, and by law the provisions for doing so are uniformly applicable throughout the State. N.C. Gen. Stat. 105-272. Under North Carolina law, all tobacco, imported and domestic, including the tobacco in this case, "held in storage . . . for manufacturing or processing" is taxed by local jurisdictions at 60% of the rate generally applicable to other property. N.C. Gen. Stat. 105-277(a).[6] Imported tobacco is thus taxed at the same rate as domestic tobacco. J.S. App. 32a.

In North Carolina, the State itself does not levy a property tax. The cities and counties of North Carolina levy

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[4] All but a "negligible" amount of the imported tobacco is used in manufacturing tobacco products for sale within the United States. J.A. 55. The negligible amount not used for that purpose involves tobacco damaged in storage. J.A. 79-80. Moreover, virtually all of the *finished products* are sold and consumed in the United States. J.S. App. 7a, 31a.

[5] Subchapter II of Chapter 105 of the North Carolina General Statutes. *See Wade* v. *Commissioners*, 74 N.C. 81 (1876).

[6] Property held in a Foreign Trade Zone is expressly exempt from the property taxes. N.C. Gen. Stat. 105-275(23).

property taxes on all taxable property within their jurisdictions as of January 1st of each year.[7] N.C. Gen. Stat. 105-285. For these counties and cities, the property tax is by far the most important source of revenue.

Prior to 1983, Reynolds for years had paid this nondiscriminatory tax on all its domestic and imported tobacco without any protest. J.A. 53-54. In 1983, however, it claimed immunity based on *Xerox Corp.* v. *County of Harris*, 459 U.S. 145, decided December 13, 1982, for the tobacco stored in its customs bonded warehouses. This tobacco, valued at $519,059,527.00, had been imported from various foreign countries, including Bulgaria, Syria, Brazil, Lebanon, Yugoslavia and Turkey. J.S. App. 28a-29a; J.A. 89. The requests for immunity were denied by the Tax Supervisor and Board of Equalization and Review in each county. J.A. 15, 18, 20, 23.

Reynolds appealed both decisions which were reviewed *de novo* by the North Carolina Property Tax Commission. After a full evidentiary hearing in the cases, which had been consolidated (J.S. App. 21a; J.A. 29, 34), the Commission denied Reynolds' claim of tax immunity. J.S. App. 21a-37a. The Commission found that "[n]one of the imported tobacco in bonded storage was being held for export by Reynolds." *Id.* at 32a. Accordingly, the Commission held that Reynolds' reliance upon *Xerox Corp.* v. *County of Harris*, 459 U.S. 145 (1982), was misplaced because all of the property in that case was

[7] Thus, if appellant's tobacco is held to be immune from tax while under bond, only a negligible amount, if any, will ever be subject to the property tax. Reynolds has complete control over the timing of the removal of its tobacco from the bonded warehouse. J.S. App. 32a. Once removed from the warehouse, the tobacco is used in manufacturing and is removed from the county in a very short time, usually a matter of weeks. J.S. App. 31a. If this Court grants imported tobacco immunity from property tax so long as it is held under bond, Reynolds will be able to avoid having any nonbonded tobacco in Durham and Forsyth County on the lien date (January 1) and thereby avoid all property taxes.



being held for export. J.S. App. 35a. The Commission ruled that the facts of this case were "more nearly like" this Court's ruling in *American Smelting and Refining Co.* v. *County of Contra Costa*, 271 Cal. App. 2d 437 (1969), *appeal dismissed*, 396 U.S. 273 (1970). J.S. App. 36a.

3. Reynolds appealed to the North Carolina Court of Appeals, which affirmed unanimously.[8] J.S. App. 5a-19a. First, the court of appeals held that the imposition of a nondiscriminatory *ad valorem* property tax did not violate the Import-Export Clause because the tax was not an impost or duty, which is all that Clause prohibits. J.S. App. 10a. Second, the court held that the property tax was not preempted by the laws regulating customs bonded warehouses. The court reasoned that the summary dismissal by this Court of the appeal in *American Smelting* was controlling because this Court there upheld a property tax levied upon imported bonded goods destined for domestic use. J.S. App. 14a-15a. In addition, the North Carolina Court of Appeals reasoned that "[t]o exempt imported tobacco aging in customs bonded warehouses from property taxation while imposing these taxes on domestically-grown tobacco aging in ordinary warehouses would be unfair." *Id.* at 15a. Finally, the court of appeals dismissed Reynolds' due process claim, holding that it is "undisputed" that "the imported tobacco stored in Reynolds' customs bonded warehouses receives fire and

[8] Subsequent to the hearing before the Commission, Reynolds filed suit in state court for refund of all property taxes paid on imported tobacco stored in the same jurisdictions for 1980, 1981 and 1982. *See R.J. Reynolds Tobacco Company* v. *Forsyth County, North Carolina and City of Winston-Salem, North Carolina*, 84 CVS 3736, pending in Forsyth County Superior Court. Similar suits concerning such tobacco stored in Durham County and Kernersville are pending. In addition, payment under protest was made by Reynolds to these jurisdictions for 1984 and 1985. Reynolds' claim of exemption for 1986 has been denied.

police protection and other services" which justify the imposition of a property tax. *Id.* at 17a.[9]

## SUMMARY OF ARGUMENT

### I.

The Court should dismiss the appeal in this case because appellant did not draw into question any state statute in the proceedings before the state courts as required by 28 U.S.C. § 1257(2). Instead, appellant challenged only the application of the taxes by the city and county officials undertaken pursuant to state law. This Court has held on numerous occasions that "an attack upon a tax assessment or levy . . . on the grounds that it infringes a taxpayer's federal rights . . . will not sustain an appeal" under Section 1257(2). *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 342 U.S. 182, 185 (1945).

Although the Court nevertheless could treat the papers as a petition for a writ of certiorari and review the questions presented under Section 1257(3), the Court should dismiss the case. The decision below does not warrant review by this Court under the standards for granting certiorari. The controversy is a localized one and the decision below conflicts with no decision of this Court or any other court. In fact, the decision below is compelled by prior holdings of this Court. More importantly, dismissal now will discourage the common practice of litigants seeking improperly to invoke this Court's appellate jurisdiction when Section 1257(2) is not clearly satisfied.

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[9] Reynolds then gave notice of appeal to the North Carolina Supreme Court and petitioned for discretionary review. J.A. 95, 97. That court granted motions to dismiss the appeal for lack of a substantial constitutional question, and denied Reynolds' petition for discretionary review. J.S. App. 1a-2a. On February 24, 1986, this Court entered an order postponing consideration of jurisdiction to the hearing on the merits. J.A. 114.



### II.

For any government, state or federal, the power to tax is crucial because all other governmental functions depend upon revenues derived from those taxes. This is why the constitutional scheme adopted by the Framers clearly envisioned the ability of state and local governments to impose nondiscriminatory property taxes on imported goods brought within their jurisdictions and stored there for use in domestic manufacturing.

The taxes at issue in this case are permitted by the Due Process Clause because the stored property is maintained within the jurisdiction of the taxing authorities and because it is undisputed that appellant has received significant governmental services to protect the imported goods stored in North Carolina. *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1940). The tax is also permitted by the Import-Export Clause because the property tax is clearly not an impost or duty. Moreover, these local property taxes do not interfere with Congress' plenary authority over foreign commercial relations, do not deprive the federal government of revenues and do not involve a tax on the importation process. *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285-288 (1976). Thus, none of the limitations on state authority embodied in the Constitutional text even remotely casts doubt upon the validity of the *ad valorem* property taxes challenged by appellant.

### III.

Under well-established principles, Congress will not be assumed to have impaired the capacity of state and local governments in our federal system to gather their needed revenues in the absence of clear indication that Congress intended that result. This Court's traditional reluctance to infer preemption is especially appropriate where the taxing power is at stake. This Court held in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985), that Congress is the guardian

against federal intrusion into state and local governments' exercise of their core governmental functions. The power to tax is such a function. Accordingly, it should be presumed that Congress has acted faithfully to its responsibility to protect state governmental prerogatives.

The Warehousing Act does not compel states to apply their taxes to disfavor domestic products by exempting from taxation imported goods for use in domestic manufacturing. Goods which are ultimately imported are subject to federal duties; only goods which are reexported are exempt from federal duties and therefore are protected from state taxes. Reynolds paid federal duties on all of the tobacco at issue here and therefore should be required to pay the cities' and counties' nondiscriminatory property taxes.

In the only decision by this Court which is squarely on point, *American Smelting* v. *County of Contra Costa*, the Court adopted precisely this distinction between imported goods held for domestic manufacture and consumption and imported goods clearly intended for reexport. In that case, this Court affirmed a state court decision holding that state taxes on property in a bonded warehouse that was held for domestic use are not preempted.

Appellant asserts that *American Smelting* has been overruled by *Xerox Corp.* v. *County of Harris*. *American Smelting* and *Xerox* are not at odds; they are complementary. Both support the twin objectives of the trade and tariff laws, promotion of American industry and revenue enhancement. At issue in *American Smelting*, as in this case, was the taxation of foreign goods for domestic use. Their foreign journey had come to an end, and there was no enhancement of use of American ports to be gained by interpreting federal law so as to preclude the tax. *Xerox* reached a different result because of the one controlling difference in the facts. The goods were present on American soil only as a way station in their



foreign journey which neither began nor ended in this country. The Court's first sentence described the goods at issue as "destined for foreign markets." 459 U.S. at 147. In *Xerox* the relevant competitors were American ports and foreign ports; American competition in that sphere was enhanced by the Court's interpretation. Here, the relevant competitors are American and foreign producers of tobacco to be used in American manufacture; preemption here will harm American competition.

In this case, the congressional objectives of protecting American competition would be frustrated if this nondiscriminatory tax is applied—as it will if appellant wins this appeal—only to American-grown tobacco. The two central purposes of the tariff and trade laws are the protection of American competitors and revenue enhancement. These objectives would be retarded, not advanced, by converting this neutral property tax into one that reaches only American products and not their foreign competitors.

## ARGUMENT

### I. THE APPEAL SHOULD BE DISMISSED BECAUSE NO STATE STATUTE WAS DRAWN IN QUESTION BEFORE THE STATE COURTS AS REQUIRED BY 28 U.S.C. § 1257(2).

The Court's order postponing probable jurisdiction did not identify the problem with appellant's jurisdictional statement. Appellant assumes (Br. 9-14) that the issue concerns the court—North Carolina Court of Appeals or Supreme Court—from which the appeal properly lies. There is a more fundamental problem with jurisdiction in this case. Appellant has never properly "drawn in question the validity" of any North Carolina statute in the manner necessary to invoke this Court's appellate jurisdiction under 28 U.S.C. § 1257(2). Rather than challenging the validity of the state taxing statute, appellant has attacked only the *actions* of the Cities and

Counties in assessing or imposing the tax and thereafter in denying Reynolds' claim of immunity.[10]

"[I]t has long been settled that an attack upon a tax assessment or levy, such as appellants here made, on the grounds that it infringes a taxpayer's federal rights, privileges or immunities will not sustain an appeal under [§ 1257(2)]." *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185 (1945); *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 650 (1942); *Rohr Aircraft Corp.* v. *County of San Diego*, 362 U.S. 628, 629-30 (1960). Instead, it is "essential to [this Court's] jurisdiction on appeal under [§ 1257(2)] that there be an explicit and timely insistence in the state court that a state statute, as applied, is repugnant to the Federal Constitution, treaties or laws." *Charleston Federal Savings & Loan*, 324 U.S. at 185 (citations omitted); *see Silkwood* v. *Kerr-McGee*, 464 U.S. 238, 246-247 (1984).

This requirement of an explicit and timely focus on the state statute itself serves to: (1) restrict this Court's

[10] Reynolds initially applied for a property tax exemption, J.A. 7, which was denied, J.A. 15. Appellant then appealed the refusal to grant the exemption, J.A. 16, 21, to the North Carolina Property Tax Commission which upheld the denial of claims "for immunity or exemption" from the *ad valorem* tax. J.A. 92. In its Notice of Appeal to the North Carolina Court of Appeals, appellant presented the issue as "[w]hether imported tobacco . . . is subject to local ad valorem taxation by [appellees]." J.A. 92-93. Reynolds did not directly raise or brief the issue of the constitutionality of any North Carolina statute in the North Carolina Court of Appeals; indeed, the only state statute cited by Reynolds in its brief to that court, N.C. Gen. Stat. § 153A-11, defines the corporate powers of the appellee counties. Brief to North Carolina Court of Appeals at 3. Instead, Reynolds framed the issue as whether "[t]he imposition of ad valorem property tax by Forsyth and Durham Counties . . . is unconstitutional." *Id.* at 5. Similarly, both the Notice of Appeal and Petition for Discretionary Review filed by Reynolds in the North Carolina Supreme Court phrased the issue as whether Reynolds' property is constitutionally "immune" from taxation, J.A. 95-96 (Notice of Appeal) or whether "[t]he imposition of ad valorem property tax by Forsyth and Durham Counties . . . is unconstitutional." J.A. 99 (Petition for Discretionary Review.)



mandatory jurisdiction; (2) assure that this Court does not act until the highest court of the state "has first been apprised that a state statute is being assailed as invalid on federal grounds"; and (3) provide the highest court of the state with an opportunity to construe the statute, perhaps to avoid the constitutional problem. *Wilson* v. *Cook*, 327 U.S. 474, 480 (1946). In addition, because "the collection of tax by a state officer . . . may or may not offend against the Constitution, independently of the constitutionality of a statute," the requirement that appellant draw the statute itself into question assures that the judicial focus remains on the legislative and not the executive or administrative acts in question. *Wilson*, 327 U.S. at 481-82. Where, as here, the "prescribed conditions [of jurisdiction under § 1257] have not been rigorously fulfilled," the appeal should be dismissed. *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. at 651.

The Court could, of course, treat the papers as a petition for a writ of certiorari and review the case under 28 U.S.C. § 1257(3). The Court more properly should dismiss the appeal and deny the writ of certiorari. For reasons outlined at some length hereafter, it is clear that the decision below is fully consistent with this Court's prior decisions and appellant has cited no lower court decisions which conflict with any of the holdings of the North Carolina Courts here. Indeed, the decisions of this Court compelled each holding below. *See infra* pages 15-16, 27-29. Appellant has made no showing that the issue is likely to affect any state other than North Carolina; even if it does, resolution by this Court can await a decisional conflict, should any develop.

This Court should dismiss this case for another reason—to discourage the practice[11] of litigants seeking im-

[11] A survey of the United States Reports over the last five years discloses at least nine instances where this Court was required to treat the papers in a case on the Court's appellate docket as a petition for certiorari and thereafter granted the writ of certiorari.

properly to invoke the appellate jurisdiction of this Court when the only appropriate mechanism for review is certiorari. The jurisdictional statutes were "intended to restrict [the Court's] obligatory appellate jurisdiction to a narrow class of cases . . .," *Memphis Natural Gas Co.*, 315 U.S. at 651; *see Phillips* v. *United States*, 312 U.S. 246, 250 (1941) (construing three-judge court jurisdictional statute with similar limits), and a litigant's efforts to stretch those jurisdictional limits should not be rewarded simply because briefs on the merits have now been filed.[12]

## II. NORTH CAROLINA'S NONDISCRIMINATORY PROPERTY TAX ON IMPORTED TOBACCO AGED AND STORED IN CUSTOMS BONDED WAREHOUSES DOES NOT VIOLATE EITHER THE DUE PROCESS OR IMPORT-EXPORT CLAUSE.

As this Court has long held, "unless restrained by the provisions of the Federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." *Cleveland P. & A. R. R.* v. *Commonwealth of Pennsylvania*, 82 U.S. (15 Wall.) 300, 319 (1873). *See Carstairs* v. *Cochran*, 193 U.S. 10, 16 (1904). There can be no serious doubt that the property tax imposed by the counties and cities is fully consistent with the balance of governmental power between

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[12] With respect to the matter discussed by appellant concerning the appropriate court from which to take an appeal, appellees' view is that the wiser course would be to assume that the dismissal of an appeal for want of a substantial constitutional question involves a disposition on the merits by that court in the absence of clear indications from state law to the contrary. Appellant concedes (Br. 11) that state law provides no basis for resolving this issue and therefore the appeal should be from the supreme court. Appellees have no quarrel with appellant's suggestion that the Court might wish to consider resolving the issue generally by rule.



federal and local interests embodied in the Constitutional text.

A. The test for determining whether a state tax survives scrutiny under the Due Process Clause is:

> whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

*Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1940). As we have already explained (*supra*, page 3), there is no question that Reynolds' imported leaf tobacco receives the same governmental benefits enjoyed by its domestic tobacco, and Reynolds has never challenged the taxes on domestic tobacco. Thus, there exists a "substantial nexus" between the tax on the imported property and the benefits, such as police and fire protection, provided by the appellees. *See National Bellas Hess, Inc.* v. *Dept. of Revenue*, 386 U.S. 753, 756 (1967); *Union Refrigerator Co.* v. *Kentucky*, 199 U.S. 194 (1905).

R.J. Reynolds needlessly attempts (Br. 32 n.42) to confuse the due process issue by arguing that goods in a customs bonded warehouse are, in Congress' view, still in the process of being imported. But, there is no reason to incorporate this Import-Export and Supremacy Clause argument into the Due Process Clause. Its sole concern is whether it is fair to tax the property; here, the tobacco's physical location within the state coupled with the receipt of governmental services clearly satisfies substantive due process. *See Thompson* v. *Commonwealth of Kentucky*, 209 U.S. 822, 827 (1908); *Hannis Distilling Co.* v. *Baltimore*, 216 U.S. 482 (1910); *Carstairs* v. *Cochran*, 193 U.S. at 16.

B. The issue whether the property tax conforms with the Import-Export Clause is controlled by this Court's opinion in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276

(1976). In *Michelin*, the Court held that the assessment of Georgia's nondiscriminatory *ad valorem* property tax on petitioner's inventory of imported tires held in their original shipping cartons at petitioner's distribution warehouse did not constitute an impermissible "Impost or Duty" under the Import-Export Clause.[13] Under *Michelin*, the inquiry has shifted "from the nature of the goods as imports to the nature of the tax at issue. The new focus is not on whether the goods have lost their status as imports but is, instead, on whether the tax sought to be imposed is an 'Impost or Duty.'" *Limbach* v. *Hooven and Allison Co.*, 466 U.S. 353, 360 (1984). The North Carolina tax is indistinguishable from the Georgia tax in *Michelin*, and therefore, it clearly does not violate the Import-Export Clause.

The Import-Export Clause "was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State." *Michelin*, 423 U.S. at 290 (footnote omitted). By means of this Clause, the Framers intended: (1) to allow the federal government to speak with one voice in commercial relations with foreign governments; (2) to protect federal import revenues; and (3) to prohibit the seaboard states from "levying taxes on citizens of other States by taxing goods merely flowing through their ports" and immediately destined for customers in other states.[14] *Id.* at 285-86. *See Limbach* v. *Hooven and Allison Co.*, 466 U.S. at 360.

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[13] The Import-Export Clause provides in pertinent part: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws . . . ." U.S. Const. Art. I, § 10, cl. 2.

[14] This power of the states to burden commerce among themselves and with foreign countries was "[o]ne of the major defects of the Articles of Confederation . . . ." *Michelin*, 423 U.S. at 283. Prior to 1789, it was "commonplace" for the states with port facilities to impose special taxes just on imported goods. *Id.*



Given these purposes, impermissible imposts and duties, "which are essentially taxes on the commercial privilege of bringing goods into a country," are readily distinguishable from a nondiscriminatory *ad valorem* property tax "by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth . . . ." *Michelin*, 423 U.S. at 287.[15] As long as the state taxes do not discriminate against imports because of their origin, the purpose of the Import-Export Clause is satisfied "by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed." *Id.* at 290.[16]

It is undisputed that the imported leaf tobacco in question is at rest in appellant's private warehouses when it is aging for use in domestic manufacture and is therefore simply a part of its business inventory in Durham and Forsyth Counties at the time the property taxes are assessed. J.S. App. 31a, 32a; J.A. 74, 82. However, because the tobacco is under customs bond at the time, ap-

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[15] The Court in *Michelin* noted that "such taxation is the *quid pro quo* for benefits actually conferred by the taxing state. There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods." *Michelin*, 423 U.S. at 289 (footnote omitted).

[16] This prohibition on taxing goods "merely in transit" is designed to prevent the "evil" that existed under the Articles of Confederation, when the states which were geographically positioned to receive imports levied taxes on goods that were merely passing through their ports, thereby allowing those states to assess a tax that would be absorbed by the citizens of other states who were the ultimate purchasers of such goods. *Michelin*, 423 U.S. at 285-86, 289-90. The purpose of the *ad valorem* property tax in this case is clearly different and does not create the problem cited in *Michelin*.

pellant argues that the goods are still "in transit" for purposes of the Import-Export Clause. This artificial distinction, which is precisely the kind of argument the Court rejected in *Michelin*, is irrelevant to any of the purposes of the Clause. See *Limbach* v. *Hooven and Allison Co.*, 466 U.S. at 360.[17]

Thus, under the scheme of federal and state relations embodied in the Constitution itself, there is no conflict between a nondiscriminatory *ad valorem* property tax and the federal government's general ability and authority to regulate foreign commerce. Even though "[i]t may be that such taxation could diminish federal impost revenues to the extent its economic burden may discourage purchase or importation of foreign goods," [18] this "incidental effect was not . . . even remotely an objective of the Framers in enacting the [Import-Export Clause]." *Michelin*, 423 U.S. at 287. As this Court recently noted, " 'we must assume that the implications and limitations of our federal system constitute a major premise of all congressional legislation, though not repeatedly recited therein.' " *Bowen* v. *American Hospital Ass'n*, No. 84-1529 (June 9, 1986), slip op. 32, quoting *United States* v. *Gambling Devices*, 346 U.S. 441, 450 (1953) (Jackson, J.). Accordingly, to hold that the property taxes challenged here are unconstitutional, the Court must conclude that Congress expressly intended to modify the

[17] Appellant's customs bonded warehouses are "operated no differently" than its warehouses used solely for domestic goods. *Michelin*, 423 U.S. at 302, J.A. 77-78, 82-83, 90. The fact that Congress allows Reynolds to defer payment of import duties on such goods provides no principled reason to afford those goods "preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies." *Michelin*, 423 U.S. at 287. *See Youngstown Sheet and Tube Co.* v. *Bowers*, 358 U.S. 534, 549-50 (1959).

[18] There is no evidence in the record of any diminishment of federal revenues resulting from the property tax in this case.



fundamental balance in the Constitution between federal control of foreign commerce and the state's power to tax property stored within its borders.

## III. THE COURT BELOW CORRECTLY DETERMINED THAT NORTH CAROLINA'S NONDISCRIMINATORY AD VALOREM PROPERTY TAX IS NOT PREEMPTED BY THE FEDERAL TRADE AND TARIFF LAWS INCLUDING THE WAREHOUSING ACT.

The principal revenue source for North Carolina's counties and cities is the property tax.[19] For these appellees, as for any governments, the power to tax is the central power of governance. All governmental functions and services depend upon the appellees' ability to generate revenue.

The central issue in this case is whether one government—the Federal Government—has taken away the power of local governments to impose the same tax on foreign goods that they impose on American goods when both are unquestionably intended to be used together in domestic manufacture. Appellant has not met the heavy burden required of one who seeks a judicial holding that Congress intended to preempt state taxing powers. Nothing in the federal statutes indicates that Congress intended either its tariff or warehousing laws to preempt state authority to tax property expressly held for import, and the only statement in the relevant regulatory history which might have cast doubt upon those taxes was deleted by the Department of the Treasury, thus strongly indicating that some state property taxation of goods stored in customs bonded warehouses is consistent with federal law.

[19] *See* Advisory Commission on Intergovernmental Relations, *Significant Features of Fiscal Federalism* 58 (Feb. 1986) (property taxes accounted for virtually 80% of all local tax collections in North Carolina in 1984); *See also id.* at 56 (property taxes accounted for 75% of all local tax collections nationwide).

**A. Under Supremacy Clause Principles, North Carolina's Property Tax Can Be Preempted Only Upon A Showing Of Clear Congressional Intent To Preempt Or A Clear Showing Of A Conflict With Federal Purposes.**

Under the preemption doctrine, which is rooted in the Supremacy Clause of the United States Constitution, this Court consistently has held that federal preemption of state law is warranted "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 153 (1982).[20] When Congress intends a matter to be controlled exclusively by federal law, it is said to "preempt the field." In that situation, even state and local regulation which complements federal purposes is unconstitutional.

In addition, preemption is required whenever state law actually conflicts with a federal statute.[21] In determining whether a "conflict" between federal and state law exists, the Court has applied two basic tests, *viz.*, (1) whether federal law and state law impose inconsistent duties making compliance with both impossible, *see, e.g., Michigan Canners and Freezers Ass'n* v. *Agricultural Marketing and Bargaining Board*, 467 U.S. 461 (1984); *De Canas* v. *Bica*, 424 U.S. 351 (1976) and (2) whether state law stands as an obstacle to the full achievement of Congress' aims. *See, e.g., Michigan Canners & Freezers Ass'n* v.

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[20] *See Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Pacific Gas & Electric Co.* v. *Energy Resources Comm'n*, 461 U.S. 190, 204 (1983); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[21] *See, e.g., Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. at 153; *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963); *Bethlehem Steel Co.* v. *New York Labor Relations Board*, 330 U.S. 767, 773 (1947); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).



*Agricultural Marketing and Bargaining Board*, 467 U.S. 461; *Jones* v. *Rath Packing Co.*, 430 U.S. at 526, 540-541; *De Canas* v. *Bica*, 424 U.S. 351 (1976).

Legislation by Congress does not exhaust the sources of federal law to which the Supremacy Clause applies. See *Louisiana Public Service Comm'n* v. *FCC*, 54 U.S.L.W. 4505, 4509 (May 27, 1986). When state law directly conflicts with a federal regulation, the regulation prevails, just as if it were a federal statute. *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 698-700 (1984); *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. at 153; *Free* v. *Bland*, 369 U.S. 663, 668 (1962). It is also clear that, within its area of delegated authority, an administrative agency has power similar to Congress' to preempt the field. *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. at 698-700; *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. at 154. The Court has also held that, if an agency with delegated rulemaking power has *not* exercised its preemptive authority, federal courts ordinarily should not infer preemption of the field or find that state law conflicts with federal purposes because those judgments are better made by the agency responsible for administering the federal statute. *Hillsborough County* v. *Automated Medical Laboratories Inc.*, 105 S. Ct. at 2379.

Generally, in applying these principles, any ambiguity in the federal law which might be construed as placing limits on state governmental prerogatives should be resolved in the state's favor. See *Rice* v. *Santa Fe Elevator*, 331 U.S. 218, 230 (1947); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963), *Merrill Lynch, Pierce, Fenner & Smith* v. *Wave*, 414 U.S. 117, 127 (1973). This principle is particularly compelling when the state's power to tax is at stake. *See Norton Co.* v. *Illinois*, 340 U.S. 534, (1951); Brief of the National Ass'n of Counties, *et al.* at 6-7. In *Garcia* v. *San Antonio Metropolitan Transit Authority*, 105 S. Ct.

1005 (1985), this Court held that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself," *id.* at 1018, and "is one of process rather than one of result." *Id.* at 1019.

The "process" to which the Court is referring is, of course, the congressional legislative process. We submit that the following rule of basic preemption law follows logically from this Court's rationale in *Garcia:* given Congress' role as the guardian of state prerogatives, it is particularly inappropriate to assume that Congress intended to diminish the states' power to gather the revenues needed to sustain themselves as governments. Thus, the Court should take special care in tax preemption cases and require either the clearest indications by Congress that it intended to preempt taxation or compelling evidence presented by the taxpayer of a real conflict between the state or local tax and federal law.[22]

### B. There Is No Conflict Between The Purposes Of The Warehousing Act As Interpreted By This Court's Prior Decisions And North Carolina's Property Tax As Applied To Appellant.

1. In its rush to argue that this case is controlled by the Court's decision in *Xerox Corp.* v. *County of Harris,* 459 U.S. 145 (1982), appellant has made no attempt to clarify on which of the legal theories its case for preemption rests. Under all of the available theories, however, the challenged taxes are not preempted. Appellant has not identified and could not identify any statement by Congress, either in the statutes or the legislative history, that Congress intended the federal trade and tariff

[22] See *Bowen* v. *American Hospital Ass'n,* slip op. 32 & n.33. In an analogous context, this Court stated in *Pennhurst State School and Hospital* v. *Halderman,* 451 U.S. 1, 16 (1981), that "we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment" because "such legislation imposes congressional policy on a State involuntarily and because it often intrudes on traditional state authority."



laws or the Warehousing Act to supersede state taxation in this setting.[23] Appellant also does not argue that the warehousing provisions of the federal customs laws are so pervasive that Congress intended to "occupy the field" of customs bonded warehousing to the exclusion of all state and local laws, including nondiscriminatory property taxes. *Allis-Chalmers Corp.* v. *Lueck,* 105 S. Ct. 1904, 1910 (1985); *Malone* v. *White Motor Corp.,* 435 U.S. 497, 504 (1978).[24] And, this is obviously not a situation where "compliance with both federal and state regulations is a physical impossibility . . . ." *Florida Lime,* 373 U.S. at 142-43. Reynolds can pay the state tax and comply with all federal warehousing requirements. Indeed, until 1983, Reynolds had complied fully with both regulatory schemes. J.A. 53-54.

[23] The appellant has, for obvious reasons, ignored the familiar axiom that the "starting point in every case involving the construction of a statute is the language itself." *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 197 (1976).

[24] Although federal regulations governing use of customs bonded warehouses are detailed, *see* 19 U.S.C. §§ 1555-1565, 19 C.F.R. §§ 19.1-19.12, as regulations ordinarily are, the mere bulk of regulation is not sufficient by itself to justify a finding of implied preemption. *Hillsborough County* v. *Automated Medical Laboratories, Inc.,* 105 S. Ct. 2371, 2376-77 (1985); *New York Dep't of Social Services* v. *Dublino,* 413 U.S. 405, 415 (1973). There is plainly no specific statement of regulatory intent to preempt the field. *See Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta,* 458 U.S. at 154. Rather, the regulations relating to storage and security requirements for the warehouses specifically refer to the need to comply with state and local "requirements." 19 C.F.R. § 19.12; J.S. App. 100a. In addition, the regulations also require the private bonded warehouse owner to "provide an estimate of the maximum duties *and taxes* which will be due on all merchandise in the bonded warehouse . . . ." 19 C.F.R. § 19.2(a) (emphasis added); J.S. App. 81a. Finally, the owner of the property held in bond shall be "liable for the expenses of labor and storage . . . and for *all* other expenses accruing upon the goods." 19 C.F.R. § 19.7 (emphasis added); J.S. App. 92a. Any businessman knows that payment of local taxes to secure fire and police protection and other local services is a cost of doing business and expects to pay such taxes.

Thus, appellant's argument is reduced to the assertion that North Carolina's property tax vaguely frustrates or interferes with the "purposes and objectives" of the customs bonded warehouse provisions. That assertion does not withstand analysis. Not only is there no conflict between the taxes here and the Warehousing Act, but as we will show later the purposes and objectives of the federal trade and tariff laws generally would be frustrated if the state tax which is levied upon home grown tobacco cannot be imposed upon imported tobacco. See pages 35-37, *infra*. To hold the local property tax preempted as applied to imports will mean that the Court is providing an American law subsidy to foreign competition which Congress never intended and clearly would not approve.

2. In arguing that there is a conflict between the specific Warehousing Act provisions and North Carolina's *ad valorem* property tax, appellant makes two arguments. First, it claims that this Court already has held that there is a conflict between the Warehousing Act and state property taxes in *Xerox Corp.* v. *County of Harris*. Alternatively, appellant asserts that North Carolina's property tax interferes with Congress' intent to provide importers with "flexibility" in deciding what they will do with their imported goods.

Neither argument supports preemption in this case. The first argument ignores the fundamental difference between goods held for import and those held for export which is clearly incorporated into the Warehousing Act and has been applied by this Court consistently in its prior decisions. Thus, properly understood, the *Xerox* decision is clearly distinguishable from this case.

The second argument simply ignores the facts of this case. R.J. Reynolds does not reexport its tobacco and never has. Thus, there is no reason for the Court in this case to hold that a property tax imposed upon imported



tobacco, which is simply the R.J. Reynolds' business inventory, interferes with any purpose underlying the Warehousing Act.

a. The customs bonded warehousing provisions constitute a component of the entry system of the customs and tariff laws. Under the Warehousing Act, which was enacted in 1846,[25] goods brought into a customs bonded warehouse which are subsequently reexported are exempted completely from import duties and goods which are ultimately used domestically are permitted a limited delay in payment of import duties. 19 U.S.C. §§ 1555-1557. The way the system operates is that no duty is paid at the time of entry on imported goods placed under bond in privately operated, customs bonded warehouses. If the importer withdraws goods for domestic use, he pays the full import duty at that time or, in the alternative, if he reexports the goods within the time limits of the statute, no duties are assessed and the bond is released. *Ibid.*

The fact that Congress requires importers, such as Reynolds, ultimately to pay duties on goods intended for domestic use would seem to preclude Reynolds' argument here that its tobacco should be immune from state taxation. Reynolds nevertheless argues that *Xerox* held that under the Warehousing Act all goods stored in a customs bonded warehouse are immune from state taxation. But *Xerox* is clearly distinguishable because the goods in that case were held for reexport. The only decision of this Court interpreting the warehousing laws which is directly on point is *American Smelting and Refining Company* v. *County of Contra Costa*, 271 Cal. App.2d 437 (1969), *dismissed for want of substantial federal question*, 396 U.S. 273 (1970), where this Court upheld a property tax on goods in a bonded warehouse which

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[25] Warehousing Act of 1846, Ch. 84, 9 Stat. 53.

were destined for domestic use.[26] Thus, this Court's relevant decisions recognize the clear distinction incorporated into the Warehousing Act between goods held for import and those intended solely for reexport.

In *McGoldrick* v. *Gulf Oil*, 309 U.S. 414 (1940), this Court reviewed a New York sales tax on fuel oil manufactured in a customs bonded warehouse and sold *exclusively* as fuel supplies to vessels engaged in foreign commerce. Under the federal statute, the crude oil was imported, refined and sold as ships' stores under bond and free from all federal tax and import duties. The statute and regulations *required* the fuel oil to be held for export only and to be kept "segregated from the common mass of goods and property within the state . . . ." *McGoldrick*, 309 U.S. at 425-26.

[26] Appellant, in effect, has conceded that the Court's dismissal for want of a substantial federal question of the appeal in *American Smelting* directly controls this case. It baldly asserted at the jurisdictional stage that "[a]fter *Xerox, American Smelting & Refining Co.* is no longer of value as a precedent . . . ." (Brief Opposing Motion to Dismiss 5) This suggestion seems most improbable in light of the fact that every brief on the merits in *Xerox* cited and discussed the *American Smelting* decision. Brief for Appellee City of Houston at 21-25; Brief for Appellee County of Harris, Texas at 31-35; Brief for Appellant Xerox Corp. at 17 n.10, 19; Appellant's Reply Brief at 6-7; Brief *Amicus Curiae* of the International Association of Assessing Officers at 10, *Xerox Corp.* v. *County of Harris*, No. 81-1489 (1982). Thus, contrary to appellant's claim, the Court's failure to cite *American Smelting* clearly indicates that the Court did not view the *Xerox* decision as affecting the validity of *American Smelting* at all, which it does not.

In this regard, it is also important to note that in *Xerox* the appellant clearly argued in its briefs in this Court that *American Smelting* only applied to goods destined for domestic consumption. Brief for Appellant 19, *Xerox Corp.* v. *County of Harris*, No. 81-1489 (1982). Xerox also argued that the state court of appeals in the *American Smelting* case had clearly held that a property tax on goods destined for export was unconstitutional. *Id.* at 19-20. Thus, appellant's suggestion (Br. 17), based solely on statements at oral argument, that the parties treated *Xerox* as involving goods intended both for import and export is mistaken.



The Court concluded that the purpose of the federal law was to "enable American refiners to meet foreign competition and to recover trade which had been lost by the imposition of the [federal] tax." *McGoldrick*, 309 U.S. at 427.[27] In light of the Congressional purpose, this Court concluded that New York's sales tax would "lessen the competitive advantage conferred . . . by Congress" and thereby "conflict with the Congressional policy . . . ." *Id.* at 428-29. Thus, the basic rule in *McGoldrick* is that imported property held temporarily before export, which is not subject to any federal duties, is also not subject to any state tax.

In *American Smelting*, the issue was whether imported ores and metals treated and held in a customs bonded smelting and refining warehouse,[28] some for export and some for domestic use, were subject to any local property taxes. The California Court of Appeal noted that the "congressional policy" in *McGoldrick* was "to relieve the importer of the import tax so that he might meet foreign competition in the sale of fuel as ships' stores." *American Smelting*, 271 Cal. App.2d at 473. The customs bonded smelting warehouse was found to further the same congressional policy "when the refined metal was exported." *Id.* Based on the holding in *McGoldrick*, the court of appeal held that the portion of refined metal

[27] The Court cited legislative history to the effect that the purpose of the bill was to "increase the trade in fuel oil in American ports." *McGoldrick*, 309 U.S. at 428. The Senate Report suggested that the tax and tariff exemption "relieves American manufacturers from a competitive disadvantage." S. Rep. No. 58, 73rd Cong., 1st Sess. 3 (1932), quoted in *McGoldrick*, 309 U.S. at 428.

[28] Such warehouses, established pursuant to Section 312 of the Tariff Act of 1930, ch. 497, Title III, § 312, 46 Stat. 692, *codified at* 19 U.S.C. § 1312, are in all respects identical to the general customs bonded warehouses, 19 U.S.C. §§ 1555-1557, except that they make special provisions for the carrying out of smelting, *i.e.*, the treatment or refining of the imported ores prior to reexport or entry into domestic commerce. *See* 19 C.F.R. § 19.1(7) (1984).

ultimately exported was clearly "exempt from local taxation." *Id.* at 481.

But the court held that imported metal for domestic use was a completely different matter. Nothing in *McGoldrick* compelled preempting local taxes on property destined for domestic use. The court concluded that Congress could not have intended the warehousing laws to "provide a bounty" for "processing metal-bearing materials of foreign origin" and thereby work "a discrimination against operation of domestic smelters refining domestic ores which are subject to local taxation." *Id.* at 474 (footnote omitted). Thus, the federal tariff laws in question were held not to "confer an immunity from a nondiscriminatory tax on property of foreign origin being processed for domestic consumption." *Id.*

On appeal to this Court in *American Smelting*, the appellant squarely presented for decision by this Court the issue whether for preemption purposes distinction could be drawn between ultimate import or export of the bonded goods:

> The court below sought to distinguish the [*McGoldrick*] case, but the attempted ground of distinction is specious. In permitting the county to tax appellant's imported property while it was in a bonded warehouse, the Court of Appeal drew a distinction between property which had to be exported when it left the warehouse, and property which could be either exported or sold domestically. According to the Court of Appeal, only property in the former category was entitled to immunity from state taxation under the Treasury Regulation and the [*McGoldrick*] decision.

Jurisdictional Statement at 11, *American Smelting and Refining Co.* v. *County of Contra Costa*, No. 70-656 (1970).

This Court dismissed the appeal for lack of a substantial federal question, thereby clearly endorsing the basic distinction between goods stored for domestic use and



those kept for eventual reexport. 396 U.S. 273 (1970). This holding is, of course, a decision on the merits and should be respected absent persuasive reasons to depart from the rule of law. *Hicks* v. *Miranda*, 422 U.S. 332 (1975). The Court's decision in *Xerox*, 459 U.S. 145 (1982), provides no such reason.

In light of the Court's prior decisions, it is plain that *Xerox* did not erect any rigid *per se* rule that all goods in customs bonded warehouses are exempt from state taxes.[29] The opening sentence makes this clear:

> We noted probable jurisdiction to decide whether a state may impose nondiscriminatory ad valorem personal property taxes on imported goods stored under bond in a customs warehouse and *destined for foreign markets*. *Xerox*, 459 U.S. at 146 (emphasis added).

And, that is precisely what the Court did decide. In *Xerox*, parts for copiers were manufactured in the United States and shipped to Mexico for assembly there. The copiers were "designed for sale in the Latin American market, and all printing on the machines and instructions accompanying them were in Spanish or Portuguese." 459 U.S. at 147. They were not approved for

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[29] The taxpayer-appellant in *Xerox* stated the Question Presented in its Brief (at i) before this Court as follows (emphasis added):

> Appellant Xerox Corporation ("Xerox"), through subsidiaries, assembled copying machines abroad, shipped them to a customs bonded warehouse in Texas, stored them temporarily and then reshipped them abroad, at all times under customs bond.
>
> May a state assess an *ad valorem* tax on goods that
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> (a) were *continuously* in the flow of *foreign commerce*;
>
> (b) *never* entered domestic commerce or became part of the common mass of property within the state;
>
> (c) *paused only temporarily* within the state; and
>
> (d) were continuously under the supervision, custody and control of the United States Customs Service.

sale in the United States, operating on 50 cycles per second rather than the required 60 cycles per recond, and it would cost approximately $100 per copier to convert them for domestic sale. *Id.* Furthermore,

> [n]one of the copiers assembled in Mexico and stored in Houston were ever sold to customers for domestic use; *all were ultimately sold abroad.* Consequently, Xerox paid no import duties on them. 459 U.S. at 148 (emphasis added).[30]

On these facts this Court held that "[t]he analysis in *McGoldrick* applies with full force here." *Id.* at 153. In both cases, "the remission of duties benefitted those shippers using American ports as transshipment centers." *Id.*[31]

The purpose of the warehousing laws was repeatedly stated by the Court in *Xerox* in reference to goods in transit: to "benefit" American business—and stimulate use of American ports—by "remitting the duty" otherwise due on goods that were subsequently exported. The opinion is also replete with references to the factual feature that distinguishes this case from *Xerox*—transshipment in international commerce.[32]

Unlike *Xerox* and *McGoldrick*, instead of being held for transshipment, "Reynolds' purpose for bringing imported tobacco into Forsyth County is to blend it with

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[30] Although the copiers had been stored awaiting transshipment since 1974, the taxing authorities did not assess a property tax until 1977 (when they also back assessed for 1976). *Id.* Thereupon, the taxpayer immediately shipped all its copiers to a foreign trade zone in Buffalo, New York and "continued to fill orders for shipment to Latin America." *Id.*

[31] No duties are remitted in this case. Instead, Reynolds has paid or will pay import duties totalling 42-48 million dollars on the imported tobacco in this case. J.S. App. 32a; see J.A. 80.

[32] *See, e.g.*, 459 U.S. at 146, 147, 148, 150, 151, 153.



domestically-grown tobacco in the manufacturing operations in Winston-Salem." J.S. App. 31a.[33] And "[n]one of the imported tobacco in bonded storage was being held for export by Reynolds." J.S. App. 32a. It is present for use here, not to be transshipped; it has arrived at its final destination. As the Property Tax Commission said, "there is nothing temporary about its existence in this country." J.S. App. 36a. Instead of duties being remitted "[a]s of January 1, 1983, customs duties paid or to be paid by Reynolds on the imported tobacco totalled 35-40 million dollars in Forsyth County and 7-8 million dollars in Durham County." J.S. App. 32a.[34] Hence, the objective of the federal provisions, which is to remit duty on goods held for reexport and thereby "to stimulate business for American industry and work for Americans," is not hindered by taxation here. *Xerox*, 459 U.S. at 151.

No financial incentive is necessary to encourage Reynolds to bring its foreign tobacco into this country; this is the only country (and Forsyth County is the only local jurisdiction) in which Reynolds manufactures finished tobacco products. J.A. 56. Subsidizing its imports, which are simply a part of Reynolds' everyday business inventory, by immunizing them from local property taxes would frustrate congressional purposes by providing a competitive advantage for imported tobacco vis-a-vis American grown tobacco.

b. The appellant also argues (Br. 20-25) that Congress intended in the Act to give importers generally the flexibility to store goods in a customs bonded warehouse while they make a decision whether to transship goods in foreign commerce. But even if Congress in 1846 was con-

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[33] It has been coming here for the purpose of manufacturing for domestic consumption for "[a]t least twenty-five" years. (J.A. 89.)

[34] The annual total property tax at issue on the subject tobacco in the five jurisdictions involved (Winston-Salem, Kernersville, Forsyth County, Durham, Durham County) is only approximately 5 million dollars.

cerned, *inter alia*, with providing some flexibility to importers in search of markets—because it was not uncommon in an age of very slow communications for a merchant to ship property without being assured of any market in the importing country—this point is irrelevant to this case.[35] Certainly Reynolds offered no proof on the need for flexibility in any of the proceedings in North Carolina. But whatever the merits of appellant's argument in a hypothetical case when an importer actually stores property while seeking a market, it is plainly not an issue here, because "[n]one of the imported tobacco in bonded storage was being held for export by Reynolds." J.S. App. 32a.[36] Indeed, appellant's reliance is particularly

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[35] Indeed, it may be doubted whether providing "flexibility" to importers has any practical applications in these times, when businesses can use telecommunications to check markets in advance of shipment. *Cf.* 47 Fed. Reg. 49356 (1982).

[36] Even assuming appellants are correct that the intent in deferring payment of customs duties was to preserve the flexibility of an importer who, unlike Reynolds, must decide whether to leave the goods here or ship them abroad, this provides no basis for holding that the importer is completely immune from property taxes that have accrued on the property while it was in storage in the warehouse. Instead, collection of the state and local taxes would only be deferred until after the importer decides to use the imports. *See Thompson* v. *Commonwealth of Kentucky*, 209 U.S. 822, 827 (1908).

But, on the record in this case, it is impossible for the Court to determine whether deferral of collection provides greater flexibility for the importer than simply paying the property tax when it comes due. In order to allow the taxing authorities to collect a deferred tax, they clearly should be permitted to require the importer to post a bond to ensure the payment of all taxes accrued. The taxing authorities also would be required to undertake extensive auditing of goods held in the warehouse and to require the taxpayer to keep exhaustive documentation of the movement of property from the warehouse. In addition, the states could charge interest on the taxes during the period of deferral. *Thompson* v. *Commonwealth of Kentucky*, 209 U.S. at 827. There is no way for the Court to decide in this case which system of taxation would



curious in light of the express concession in its brief (at 29) that all of the tobacco is "property stored in customs bonded warehouses and destined *for domestic use*." (emphasis added).

Appellant thus asks the Court to strike down a critical source of revenue to these local governments purely on the basis of a hypothetical problem that may never exist. In doing so, appellant ignores "the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation when none clearly exists." *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. at 446.

3. Any doubt about whether there is a real conflict between the Warehousing Act and North Carolina's property tax should be resolved in the Counties' and Cities' favor because the Treasury Department, which administers these provisions, has found no need to preempt the tax as applied to the situation presented by Reynolds' importing practices. This Court last Term made clear that when Congress has not expressed its intent to preempt state law and has delegated rulemaking authority to an administrative agency, the Court ordinarily will decline to find a conflict between federal and state law. Instead, the Court will defer to the administrative agency, which can best effectuate Congress' intent by enacting carefully tailored regulations to preempt state law, only to the extent needed to further Congress' purposes. *Hillsborough County* v. *Automated Laboratoies, Inc.*, 106 S.Ct. at 2379.

Under that holding, it is clear that the Court should not substitute its judgment for that of the Treasury Department in this case. Congress specifically delegated to the Secretary of the Treasury the power to "establish

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provide the importer with the greatest "flexibility." At a minimum, the absence of any facts concerning an importer in search of a market for its goods is reason enough for the Court not to entertain appellant's post hoc, hypothetical challenge to the *ad valorem* property tax in this case. *See Huron Portland Cement Co.* v. *Detroit*, 362 U.S. at 446.

such rules and regulations as may be necessary . . . to protect the interests of the Government in the conduct, management, and operation of such warehouses. . . ." 19 U.S.C. § 1556. Nothing in the present regulations indicates that preemption of these nondiscriminatory state property taxes is necessary to protect federal interests.

To the contrary, not only has the Secretary declined to issue a regulation specifically preempting state taxing authority with respect to imported goods in customs bonded warehouses, but a provision in the regulations which provided that "[i]mported goods in bonded warehouses are exempt from taxation . . . of any state or subdivision thereof," 19 C.F.R. § 19.6(c) n.11 (1982), was *deleted* by the Treasury Department on November 1, 1982. 47 Fed. Reg. 49370. Although "[t]he Treasury Department offered no explanation for the amendment" deleting footnote 11, *Xerox Corp.* v. *Harris County*, 459 U.S. at 152 n.8 (1982), in order to give any effect to this regulatory action, the Court at least must hold that property taxes upon ultimately imported goods stored in a customs bonded warehouse are permissible. If such taxes are not upheld here, where all of the goods are destined for use in domestic manufacture, then the deletion of that footnote would be rendered superfluous by this Court.

This regulatory history also clearly demonstrates that the Treasury Department knows how to draft a regulation to preempt the States' taxing powers. Given the strong presumption against preempting the power of state and local governments to tax, this Court should not hold that the local taxes here interfere with congressional objectives absent a clear statement of need either from Congress [37] or its delegate, the Secretary of the Treasury.

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[37] The common sense reaction to such a proposal—that Congress exempt Syrian and Bulgarian tobacco from the property taxes that American tobacco pays—is that Congress would not seriously consider it. There is no reason to conclude that any other Congress from 1846 to the present would have taken any other view.



### C. North Carolina's Property Tax Is Completely Consistent With Congress' Intent And The Purposes Underlying The Federal Trade And Tariff Laws.

Not only do the property taxes at issue in this case not conflict with the specific purposes and objectives of the federal warehousing laws, but if appellant is exempt from those taxes, the general purpose of the trade and tariff laws to protect American business will be impaired. The trade and tariff laws have their origin in the Tariff Act of July 4, 1789, passed by the First Congress of the United States. 1 Stat. 24. The purposes of that Act were proclaimed to be "the support of government, for the discharge of the debts of the United States, and for the encouragement and protection of manufactures." *Id.* The current tariff laws, codified in Title 19 of the United States Code, impose and regulate the payment of customs duties on the full value of all non-exempt goods imported into United States Customs territory. *See* 19 U.S.C. § 1202 headnote 1. According to the Chief Judge of the United States Court of International Trade,[38] "[t]ariff acts generally have provided the means to protect American producers and manufacturers, while, attempting, at the same time, to encourage fair trade." Re, *Litigation Before the United States Customs Court*, 19 U.S.C.A. XVII-XVIII (1978) (article introducing and discussing customs and tariff law).[39]

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[38] The United States Customs Court was redesignated the United States Court of International Trade by the Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980).

[39] Congress in revising the tariff laws has repeatedly expressed its dominant intent to protect American business. For example, the Committee Report on the Tariff Bill of 1922 stated that one of the purposes of the bill was to impose rates "sufficient to protect the American market and preserve domestic competition and at the same time . . . permit fair competition from other countries." H.R. Rep. No. 595, 67th Cong., 2d Sess. 3 (1922). *See e.g.*, H.R. Rep. No. 248, pt. 1, 67th Cong., 1st Sess. 2 (1921) (purpose is to "permit the products of American labor to compete with foreign goods in

Although the modern trade laws are extremely complex, reflecting multiple purposes and goals, it is fair to say that protection of American industry has always been and remains one of the primary goals of the customs and tariff laws. See *J. W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 412 (1928).[40] Foreign commerce is

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the American markets without sacrificing the American standards of living"); H.R. Rep. No. 7, 71st Cong., 1st Sess. 6 (1929) ("first duty was to our own people and to maintenance of their prosperity"); *Id.* at 7. ("It is not the intent of the present bill to eliminate imports. They are still to come in, but not on terms disadvantageous to our own producers and wage earners."); *Id.* at 9 ("Americans [should] have a preferential right in their own vast market . . .").

The legislative history for the Warehousing bill of 1846 also demonstrates Congress' determination to protect American industry. The report of the Committee of Commerce stated:

> Under the operation of this system, these goods, instead of being forced on the market to its extreme depression, . . . will be deposited until a market is found not overstocked with goods of this description; thus relieving our manufacturers from the undue depression of their fabrics, the importer from the loss arising from such forced sales, . . . and, in a degree, preventing those tremendous revulsions in commerce which have so recently shrouded our country in gloom.

H.R. Rep. No. 411, 29th Cong. 1st Sess., App. B, 13a (1846).

[40] A brief examination of the modern trade laws demonstrates how many of its major provisions are designed to protect American industries. For example, the antidumping provisions of the trade laws provide for assessment of a duty whenever it is determined that imported merchandise is being sold in the United States below its fair market value and that the sale of such merchandise is materially injuring a domestic industry. 19 U.S.C. § 1673. Countervailing duties on imported goods are assessed to offset any foreign government subsidization of its industry thereby eliminating any competitive advantage over American made goods. 19 U.S.C. § 1671. Other provisions of the trade laws provide that the President may "declare new or additional duties" upon foreign imports when he finds that the importing country either imposes any "unreasonable charge" on American goods or "[d]iscriminates . . . against the commerce of the United States . . . ." 19 U.S.C. § 1338. Unfair



thus encouraged not by allowing foreign imports to have a free ride to the detriment of domestic products, but rather by protecting American business and trade. To preempt state taxation in this case would undermine Congress' intent in levying and collecting duties on Reynolds' imported tobacco which clearly is "to keep up a price to foster domestic production." *American Smelting and Refining Co.* v. *County of Contra Costa*, 271 Cal. App. at 474 n.27. As the court in *American Smelting* reasoned, if Congress had intended to subsidize such imports, it would have been more logical to lower the duties for these goods than to preempt state taxes. *Ibid.* In that way Congress would insure a subsidy at a desired level for such business. But it has not done so. North Carolina's nondiscriminatory tax assures that domestic and foreign commerce are treated equally in accordance with the fundamental purpose of the broader trade and tariff laws.

### D. Congress' Intent To Preempt State Taxes Applied To Property In Foreign Trade Zones Is Irrelevant To Its Intent With Respect To The Warehousing Act.

Finding insufficient support for a preemption argument in the background and purposes of the Warehousing Act, which is the only statute at issue in this case, R.J. Reynolds attempts to shift the Court's attention to a recent amendment to the Foreign Trade Zones Act ("FTZA").[41] Without acknowledging that the FTZA is

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trade practices "the effect or tendency of which is to destroy or substantially injure an industry . . . in the United States . . ." are declared unlawful under 19 U.S.C. § 1337. *See also* 19 U.S.C. § 1351.

[41] Section 231(b) of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948, 2991 (1984), contained the following addition to the Foreign Trade Zones Act:

> Tangible personal property imported from outside the United States and held in a zone for the purpose of storage, sale, exhibition, repackaging, assembly, distribution, sorting, grad-

completely irrelevant to this case, appellant asks (Br. 26-30) the Court to infer that Congress implicitly intended the amendment in question, which exempts certain property in foreign trade zones from state and local *ad valorem* taxation to apply to its imported goods in customs bonded warehouses.[42] Although there are foreign trade zones in North Carolina, including one in Durham County, appellant has never attempted to store its tobacco in such a zone. Those zones are public utilities; they are maintained and available for public use. 19 U.S.C. § 81n. Reynolds obviously prefers to store and age its tobacco in its privately owned and operated warehouses very near to its manufacturing facilities. Thus, the amendment to the FTZA, instead of providing support to Reynolds' preemption argument, completely undermines it.

All that is clear from the amendment to the F'TZA is that Congress knows how to preempt local taxation when

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ing, cleaning, mixing, display, manufacturing, or processing, and tangible personal property produced in the United States and held in a zone for exportation, whether in its original form or as altered by any of the above processes, shall be exempt from State and local *ad valorem* taxation.

[42] Obviously, congressional intent cannot be inferred from congressional silence. *Scripps-Howard Radio* v. *FCC,* 316 U.S. 4, 11 (1942) ("the search for significance in the silence of Congress is too often the pursuit of a mirage"). Although the legislative history of the 1984 amendment to the Foreign Trade Zones Act contains references to the congressional objectives of the foreign trade zones, appellant cites not a single congressional statement suggesting that the amendment in question was intended to apply to the Warehousing Act.

Nor does appellant's reliance on congressional "approval" of this Court's holding in *Xerox Corp.* v. *County of Harris* provide any reason to expand the holding in *Xerox* to include business inventory stored in warehouses destined exclusively for import. Statements by legislators made 140 years after the relevant legislation—the Warehousing Act—and made in connection with a completely different statute are literally no evidence of Congress' intent regarding the Act at issue here. See *Weinberger* v. *Rossi,* 456 U.S. 25, 35-36 (1982).



it believes such action is necessary to further national policies. The congressional silence with regard to customs bonded warehouses when compared to the extremely explicit congressional action taken with respect to trade zones, conclusively shows that Congress has not preempted the taxes at issue in this case.[43]

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[43] Moreover, foreign trade zones are dissimilar to customs bonded warehouses in ways that explain why Congress would expressly preempt state taxation of goods in trade zones while permitting taxation of goods stored in customs bonded warehouses when the goods are clearly destined for domestic use. Foreign trade zones were created to "increase export/reexport trade" and capture the "manufacturing or assembling of goods in U.S. foreign trade zones that would otherwise be done in foreign countries." 129 Cong. Rec. S7748 (daily ed. June 6, 1983) (Statement of Sen. Bentsen). These purposes are irrelevant to the Warehousing Act as applied to imported goods stored exclusively for domestic use. *See* Brief of the National Ass'n of Counties, *et al.* at 14-17.

## CONCLUSION

The appeals should be dismissed. Treating the jurisdictional statements as petitions for writs of certiorari, the petitions should be denied. Alternatively, the judgments of the North Carolina Court of Appeals and North Carolina Supreme Court should be affirmed.

Respectfully submitted,

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June 12, 1986

# REPLY

# BRIEF

Nos. 85-1021 and 85-1022

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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R.J. REYNOLDS TOBACCO COMPANY,
*Appellant,*

v.

DURHAM COUNTY, NORTH CAROLINA, *et al.*,
*Appellees.*

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**On Appeals from the Supreme Court of North Carolina and the North Carolina Court of Appeals**

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## REPLY BRIEF FOR THE APPELLANT

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### AMENDED STATEMENT UNDER RULE 28.1

The name of Reynolds' parent has been changed to RJR Nabisco, Inc.

## TABLE OF AUTHORITIES





## TABLE OF AUTHORITIES—Continued

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**On Appeals from the Supreme Court of North Carolina and the North Carolina Court of Appeals**

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## REPLY BRIEF FOR THE APPELLANT

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### I. JURISDICTION

The cases cited by Appellees on the jurisdictional question are not controlling here. Recent decisions of this Court clearly show that there is jurisdiction under 28 U.S.C. § 1257(2) when, as here—

> the state court holds the [state] statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds.

R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice (6th ed. 1986) § 3.4(b).[1]

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[1] The three cases principally relied on by the Appellees (Br. p. 12) all involved essentially factual disputes as to the application of a state statute in a situation where there was no doubt that it could be validly applied. *Memphis Gas Co. v. Beeler*, 315 U.S. 649 (1942); *Charleston Federal Savings and Loan Ass'n v. Alderson*, 324 U.S. 182 (1945); *Rohr Aircraft Corp. v. County of San Diego*, 362 U.S.

In particular, two recent cases, *Xerox Corp. v. County of Harris*, 459 U.S. 145, 149 (1982), and *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-41 (1979), make the Court's jurisdiction clear because they involve jurisdictional circumstances virtually identical to those here. Neither of these cases is cited (on this question) in the Appellees' brief.

The North Carolina Court of Appeals, in its opinion in this case, referred to a specific State statute—"The Machinery Act, G.S. 105-271, *et seq.*" J.S. App. C., 17a.[2] In the concluding paragraph of the substantive portion of its opinion, the North Carolina Court of Appeals held that "the imposition of ad valorem property taxes [which the court, in this case, had already said "is governed by The Machinery Act, G.S. 105-271, *et seq.*"] is constitutional under the Import-Export clause, Commerce clause, Supremacy clause, and Due Process clause of the U.S. Constitution." J.S. App. C, p. 18a.

The *Japan Line* case, *supra*, like this one, involved an ad valorem property tax. The question before the California court was whether the tax imposed by the statute, as applied to the facts before it, was constitutional under the Commerce Clause. This Court, in finding that it had jurisdiction of the appeal under § 1257(2), stated (441 U.S. at 441) that:

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628 (1960). Moreover, in the *Charleston Federal* case, this Court said (324 U.S. at 185):

> Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal.

That is exactly the situation here, as shown below.

Furthermore, in all three of the cases relied on by the Appellees, although the appeal was dismissed, *certiorari* was granted, and the Court reviewed the decisions below.

[2] The statute is quoted in full at p. 72a of Appendix L to the Jurisdictional Statements.



> We have held consistently that a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds.

Even closer is this Court's decision in *Xerox Corp. v. County of Harris, supra*, which is an almost exact parallel of this case.[3] There, the Court held (459 U.S. at 149) that:

> an indispensable predicate to an award of judgment to the appellees on their counterclaims was a determination that the taxes at issue were permissible under the United States Constitution; the Texas Court of Civil Appeals so held. . . . We therefore have jurisdiction to review that judgment. 28 U.S.C. § 1257(2).

The jurisdictional decisions by the Court in the *Japan Line* and the *Xerox* cases should be determinative of the jurisdiction here.[4]

## II. PRE-EMPTION

The significant fact about the *Xerox* decision is that it was based on the Supremacy Clause alone. Although Xerox' only claim was that "the taxes in question were unconstitutional because they violated the Import-Export Clause and the Commerce Clause" (459 U.S. at 149), the Court found it unnecessary to consider those clauses, because the Supremacy Clause was, in its view, so clearly

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[3] The *Japan Line* decision was cited in the Jurisdictional Statement in the *Xerox* case, but was not referred to by the Court in its opinion.

[4] *See* this Court's recent decisions in *Wardair Canada, Inc. v. Florida Department of Revenue*, No. 84-902, decided June 18, 1986, and *Ohio Civil Rights Commission v. Dayton Schools*, No. 85-488, decided June 27, 1986. *See also McCarty v. McCarty*, 453 U.S. 210, 219-20 n.12 (1981); *Cohen v. California*, 403 U.S. 15, 17-18 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61 n.3 (1963).

applicable. 459 U.S. at 154. The decision in *Xerox* was based on "Congress' comprehensive regulation of customs duties." *Id.* Thus it is irrelevant whether goods held under such regulations are eventually destined for import or export, for they are all subject to the same federal regulations.[5]

The Court clearly framed the question it was considering when it stated (using the term "such goods" to include goods "destined for American consumption"):

> The question is whether it would be compatible with the comprehensive scheme Congress enacted to effect these goals if the states were free to tax such goods while they were lodged temporarily in Government-regulated bonded storage in this country. 459 U.S. at 151.

The decision of the Court is unequivocally stated in these words:

> [W]e *hold* that state property taxes on goods stored under bond in a customs warehouse are pre-empted by Congress' comprehensive regulation of customs duties.

459 U.S. at 154, emphasis supplied.[6]

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[5] The arguments made by the Appellees in Point II of their brief, based on the Due Process and Import-Export Clauses, are not pertinent in considering the Supremacy Clause decision in the *Xerox* case.

[6] Appellees point to the Court's opening statement in the *Xerox* opinion that the property in question was "destined for foreign markets." 459 U.S. at 146. This was a concise statement of the case, but not a definition of the issue to be resolved. The order noting probable jurisdiction in *Xerox* (456 U.S. 913 (1982)), did not limit the appeal to goods in a customs bonded warehouse when the goods were destined for reexport. *See, e.g., Westinghouse Electric Corp. v. Tully, prob. juris. noted,* 459 U.S. 1144 (1983).



Appellees assert (Br. 23) that Reynolds—

> does not argue that the warehousing provisions of the federal customs laws are so pervasive that Congress intended to "occupy the field" of customs bonded warehousing to the exclusion of all state and local laws, including nondiscriminatory property taxes.

This is not correct.

In *Xerox*, this Court stated that "Congress established a comprehensive customs system" utilizing "Government-supervised bonded warehouses where imports may be stored duty free for prescribed periods." 459 U.S. at 150. The Court further noted that "Detailed regulations control every aspect of the manner in which the warehouses are to be operated." *Id.*

Referring to the legislative history of the Warehousing Act of 1846, the Court (459 U.S. at 150) framed the question before it in terms of whether state taxation of the goods "would be compatible with the *comprehensive scheme* Congress enacted to effect these goals . . . ." 459 U.S. at 151; emphasis supplied. The Court stated that "freedom from state taxation is as necessary to the congressional scheme [under consideration in *Xerox*] as it was in *McGoldrick*." 459 U.S. at 153.

Finally, quoting its 1877 decision in *Fabbri v. Murphy*, 95 U.S. 191, 197-198, the Court in *Xerox* again stated (459 U.S. at 154):

> "Congress did not regard the importation as complete while the goods remained in the custody of the proper officers of customs." [7]

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[7] This observation in *Fabbri* led to the result there that the duty, when imposed, was paid at the rate applicable at the time when the goods left customs control. The same view was expressed by Learned Hand, J., in *United States v. Ehrgott*, 182 F. 267, 273 (C.C.S.D.N.Y. 1910), when he said that goods in a customs bonded warehouse were "as it were, detained at the borders."

Collectively, these statements evidence a decision by this Court that Congress intended to occupy the entire field, and that no goods stored in a customs bonded warehouse are "subject to [a state's] taxing jurisdiction until they [are] removed from the warehouse." 459 U.S. at 154, summarizing the reasoning in *District of Columbia v. International Distributing Corp.*, 118 U.S. App. D.C. 71, 73-74, 331 F.2d 817, 819-820 (1964). On this basis, Reynolds' contention, as stated in its initial brief (p. 18), is that "the broad and unqualified conclusion of the opinion in *Xerox* would indicate a finding of total pre-emption."

In support of its conclusion of pre-emption, this Court clearly stated in *Xerox* that the deferral of duties on imported goods "destined for American consumption" had as "its objective . . . to stimulate business for American industry and work for Americans." 459 U.S. at 151. State taxation of imported materials in customs custody, destined for use in manufacture in the United States, clearly conflicts with this objective in some degree. This conflict, together with the administrative problems of coping with imports which at the time of importation are not always destined either for reexport or domestic use, support the *Xerox* holding of pre-emption on the alternate ground of specific conflict with Congressional purpose.

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Appellees attempt to counter this analysis of the *Xerox* opinion by two lines of argument which Reynolds submits are distracting rather than persuasive.[8] The first should

[8] Appellees also argue (Br. 33-34) that a finding of pre-emption here would render "superfluous" the deletion of footnote 11 to 19 C.F.R. § 19.6(c) (1982). *See* 47 Fed. Reg. 49370. This Court has never considered the language in the regulations reciting a prohibition on state taxation to be controlling except to note that such language "states only what is implicit in the Congressional regulation of commerce . . . ." *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414,



more properly be addressed to the Congress. Appellees assert (Br. 19) that "[t]he principal revenue source for North Carolina's counties and cities is the property tax," [9] and that (Br. 24) applying the *Xerox* decision as Reynolds contends it should be applied would constitute a "subsidy to foreign competition which Congress never intended and clearly would not approve." [10] The question whether, as a result of these factors, Congress *now* should or should not allow North Carolina to impose its property taxes on the inventory here, is not a relevant issue in this case. The only relevant issue is whether this Court has already held that the customs bonded warehouse scheme which Congress established 140 years ago pre-empts such taxation. That issue was decided in the *Xerox* case.

The second line of argument advanced by Appellees is built on this Court's summary disposition in *American*

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429 (1940); *see also Xerox v. County of Harris, supra*, 459 U.S. at 152, n.8.

[9] Appellees imply (Br. 6) that Reynolds' 1983 claim of immunity from property taxation on inventory stored in customs bonded warehouses was a reversal of long-standing prior practice under which Reynolds paid the tax without protest, and that (Br. 3) a decision for the Appellant would have a serious financial impact on Appellees, particularly Forsyth County. These statements are misleading. Prior to this Court's decision in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, *reh'g denied*, 424 U.S. 935 (1976), imposition of property taxes on imported inventory was considered barred by the "original package" doctrine. A decision reaffirming *Xerox* would return Forsyth County to its pre-1977 financial position. In any event, the loss in revenue should not control the result here—it is a matter for Congress to consider. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 456-457 (1979).

[10] North Carolina grants an exemption from taxation for tobacco for the year following the year in which it is grown if in "an unmanufactured state" and "owned by the original producer." *N.C. Gen. Stat.* § 105-275(4). Thus, the tax exemption claimed by Reynolds does not necessarily disadvantage domestic tobacco to the extent claimed by Appellees.

*Smelting & Refining Co. v. County of Contra Costa*, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570 (1969), *appeal dismissed*, 396 U.S. 273, *reh'g denied*, 397 U.S. 958 (1970). The relevance of *American Smelting* to the issue presented in *Xerox* and here is doubtful, since the statutory scheme in *American Smelting* involved a "smelting and refining warehouse" under 19 U.S.C. § 1312. Such warehouses found their origins in the McKinley Tariff Act of 1890, with a different legislative history than the Warehousing Act of 1846 on which the statutes involved here (19 U.S.C. §§ 1555-1565) are based. In *American Smelting*, the legislative history of the Warehousing Act of 1846 was not cited by the California Court of Appeals, nor was it presented to this Court in the Jurisdictional Statement. Under the principle established by *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), that summary dispositions extend only to "the precise issues presented and necessarily decided," *American Smelting* would not be controlling here.

In any event, this Court has held in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981), that—

> summary actions do not have the same authority in this Court as do decisions rendered after plenary consideration. [Citations omitted.]

In *Xerox*, this Court gave "plenary consideration" to the pre-emption issue presented in *American Smelting*, and it reached a contrary result. Although the Court did not expressly overrule *American Smelting* in its *Xerox* opinion, the summary dismissal is no longer of any precedential value. *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 360-361 (1984).[11]

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[11] Appellees also attempt to utilize *McGoldrick v. Gulf Oil Corp., supra*, as authority for their position. This effort again founders because of failure to read the *Xerox* opinion carefully. In *Xerox* (459 U.S. at 153), this Court clearly stated that:

> We can discern no relevance to the issue of congressional intent in the fact that the fuel oil in *McGoldrick* could be sold only as ships' stores whereas Xerox had the option to pay the duty and withdraw the copiers *for domestic sale*, . . . . [Emphasis supplied.]



A unique aspect of the present case is the approval of the Court's *Xerox* decision, evidenced by Congress when it enacted the Trade and Tariff Act of 1984. Appellees argue (Br. 37-39) that this Court should not consider the background and motivations for the 1984 Act expressed in statements made by members of Congress who proposed it.

The legislative history of the 1984 Act clearly shows that Congress understood, on the basis of this Court's decision in *Xerox*, that state taxation of all goods stored in customs bonded warehouses was pre-empted. Thus, in enacting a statutory exemption for property stored in foreign trade zones,[12] Congress did not intend to create an exemption for imported property where none previously existed. Rather, it merely wanted to make it clear that the same exemption was applicable to persons using foreign trade zones, without requiring them to establish that right through litigation.

This Court has previously held that the kind of legislative history presented by Reynolds here is relevant in determining prior congressional intent. *See Cannon v. University of Chicago*, 441 U.S. 677, 686-687, n.7 (1979). There, in deciding that a private right of action was implicitly authorized by 1972 legislation, the Court stated that:

> Although we cannot accord these remarks [referring to statements by Members of Congress in 1976

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[12] Appellees (Br. 38) have apparently misread the argument advanced by Reynolds in its initial brief (pp. 26-30). Reynolds made no claim that Congress intended this 1984 statutory exemption to apply to property stored in a customs bonded warehouse. That exemption was made clear in *Xerox*, and Congress relied on that decision in enacting the 1984 Act.

> indicating their understanding of the 1972 law] the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of [the 1972 legislation] and its place within "the civil rights enforcement scheme" that successive Congresses have created over the past 110 years.

The same is true here. It is relevant to consider the statements by Members of Congress made in the course of enactment of the 1984 Act, reflecting the reliance of Congress on the *Xerox* decision, which was the very basis of the need to make it clear that the rule of that case also applied to foreign trade zones.

## III. JURISDICTION TO TAX

As discussed *supra*, pp. 3-6, this Court found evidence of pre-emption in the intention of Congress "to make customs bonded warehouses federal enclaves free of state taxation" where imports are "not subject to [a state's] taxing jurisdiction until they [are] removed from the warehouse." *Xerox Corp. v. County of Harris*, 459 U.S. 145, 154 (1982), citing *District of Columbia v. International Distributing Corp.*, 118 U.S. App. D.C. 71, 331 F.2d 817 (1964); *see also Fabbri v. Murphy*, 95 U.S. 191, 197-198 (1877). This rationale for pre-emption supports Reynolds' separate claims that the tax here is proscribed by the Due Process Clause and Import-Export Clause of the United States Constitution.

Appellees rely on *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940), but this is unwarranted. The tax at issue here is a property tax, not an excise tax. Thus, it is irrelevant to this due process claim that Reynolds engages in business in North Carolina or that Durham and Forsyth Counties provide police and fire protection to real and personal property owned by Reynolds situated in their respective counties. In order to sustain the validity of the property tax here on due process grounds, it



must be shown that the property to be taxed is within the "jurisdiction" of the authority seeking to impose the tax. *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 204 (1905). Under *Fabbri* and its progeny, the property in issue here is not within the Appellees' taxing jurisdiction.

Appellees obliquely refer to *Fabbri* by arguing (Br. 15) that the Court should ignore what Congress intended, *i.e.*, that imported goods do not come to rest in a taxing jurisdiction until removed from the customs bonded warehouse. Appellees instead argue that the Court should decide the due process argument solely on a "fairness" standard. This clearly has no merit.[13]

Appellees concede that the conclusion of law stated in *Fabbri* (95 U.S. at 197-198), and affirmed in *Xerox* (459 U.S. at 153-154), requires consideration of Reynolds' claim that the tax here is proscribed by the Import-Export Clause. They argue, however (Br. 15-19), that the tax sought to be imposed is valid under *Michelin Tire Corp. v. Wages*, 423 U.S. 276, *reh'g denied*, 424 U.S. 935 (1976). It is relevant to note, though, that the property involved in *Michelin* was no longer in the custody of the United States Customs Service.[14] Thus, the Court did not have before it the specific issue presented here.

In *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 358 (1984), the Court stated that in *Michelin:*

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[13] If a fairness standard is adopted, it would open the door to a claim by a property owner that the tax is not fair when the amount to be paid grossly exceeds the value of services provided to the property that is taxed.

[14] The opinion in *Michelin* states (423 U.S. at 280) that:

> Upon arrival of the ship [carrying the sea vans of imported goods] at the United States port of entry, the vans are unloaded . . . and . . . hauled to [Michelin's] distribution warehouse after clearing customs upon payment of a 4% import duty.

> It found that in the history of the Import-Export Clause, there was nothing to suggest that a tax of the kind imposed on goods that were *no longer in import transit* was the type of exaction that was regarded as objectionable by the Framers. [Emphasis supplied.]

Under *Fabbri* and *Xerox*, imported goods that have been withdrawn from customs custody for domestic consumption, as was the case in *Michelin*, are "no longer in import transit." Such is not the case, however, with regard to imported goods which are still in customs custody. The import journey for those goods is not complete. Thus, an essential element of the *Michelin* standard is not satisfied here. Even though the tax in issue is a nondiscriminatory tax, the property here has not completed its import journey; it is still under federal control and has not yet entered the state's taxing jurisdiction.

## CONCLUSION

This Court has jurisdiction of the appeal. The judgment below should be reversed.

Respectfully submitted,

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# AMICUS CURIAE

# BRIEF

Nos. 85-1021 and 85-1022

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

R.J. REYNOLDS TOBACCO CO.,
*Appellant,*

v.

DURHAM COUNTY, NORTH CAROLINA AND
FORSYTH COUNTY, NORTH CAROLINA,
AND ITS AFFECTED MUNICIPALITIES,
*Appellees.*

**On Appeal from the Supreme Court of North Carolina and the North Carolina Court of Appeals**

## BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, AND NATIONAL LEAGUE OF CITIES, AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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## QUESTIONS PRESENTED

1. Whether a nondiscriminatory property tax imposed by a local government on imported goods stored in a customs bonded warehouse pending domestic manufacture is preempted by congressional legislation governing the payment of import duties.

2. Whether a nondiscriminatory property tax imposed by a local government on imported goods stored in a customs bonded warehouse pending domestic manufacture is prohibited by the Import-Export Clause or the Due Process Clause.

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**On Appeal from the Supreme Court of North Carolina and the North Carolina Court of Appeals**

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## BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, AND NATIONAL LEAGUE OF CITIES, AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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### INTEREST OF *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case concerns the collection of a personal property tax by two counties and three cities in North Carolina

(hereinafter "Counties"), pursuant to state law, upon imported tobacco stored in customs bonded warehouses by R.J. Reynolds Tobacco Co. ("Reynolds") preparatory to its use in the domestic manufacture of cigarettes and other tobacco products. The North Carolina Court of Appeals rejected Reynolds' claim to an exemption from the tax. In upholding the application of the tax to Reynolds, the court dismissed constitutional challenges asserted under the Import-Export Clause, the Supremacy Clause, and the Due Process Clause. *Amici* submit that the court's carefully reasoned opinion strikes the proper balance between the federal interest in the regulation of imports and exports and the State's sovereign power to tax goods and businesses within its jurisdiction.

*Amici* are critically concerned with Reynolds' proposed expansion of the preemptive penumbra of congressional enactments that are, at most, tangentially related to the challenged state tax. Reynolds' view distorts this Court's preemption jurisprudence and severely intrudes on the powers and prerogatives of the State. In the absence of an express statement or actual conflict, this Court has appropriately insisted that preemption requires either clear evidence of congressional intent to occupy the regulatory field or an obstacle posed by the state law to the fulfillment of Congress's objectives. These concerns are particularly important in resolving preemption challenges to the States' sovereign and essential power to impose taxes.

*Amici* submit that the decision of the North Carolina Court of Appeals is correct. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

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[1] Pursuant to Rule 36 of the Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.



## STATEMENT OF THE CASE AND INTRODUCTION

*Amici* adopt appellees' statement of the case, and emphasize the following points.

Reynolds challenges the imposition of a nondiscriminatory *ad valorem* property tax upon tobacco that Reynolds imports for use in its manufacturing operations within the State. Because the tobacco is stored under customs bond—in order to permit Reynolds to defer payment of the tariff, while securing its ultimate payment to the federal treasury (see Joint Appendix ("J.A.") 63)—Reynolds contends that the state tax is preempted.

In urging preemption, Reynolds relies primarily on this Court's decision in *Xerox Corp. v. County of Harris, Texas*, 459 U.S. 145 (1982), which invalidated a local tax on imported equipment stored in a public customs bonded warehouse pending re-export. *Amici* urge that the narrow holding of the *Xerox* case should not be expanded to the breadth of some of the language in the opinion; to the contrary, the *Xerox* holding should be viewed as the outermost limit of federal preemption of state taxes on imported property stored within a State and receiving the benefit of essential state services.

*Amici* address primarily the question of preemption because of their concern over increasing attempts by private businesses to avoid local regulation on the basis of an alleged conflict with supposed congressional goals in tangentially related legislation.[2] Such preemption is particularly harmful to state and local governments in the area of taxation, where the exemption of local businesses from uniform property assessments increases proportionally the tax burden on all other citizens of the community.[3]

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[2] *See, e.g., Fisher v. City of Berkeley*, —— U.S. ——, 106 S.Ct. 1045 (1986).

[3] In 1984, property taxes accounted for more than three-fourths of all county tax revenue throughout the United States, and for

*Amici* address only briefly Reynolds' remaining constitutional arguments, for we believe that they have been clearly precluded by controlling decisions of this Court.

## SUMMARY OF ARGUMENT

1. Congressional intent to preempt state law should not be lightly inferred, especially in areas involving such vital state interests as taxes. The property tax whose validity is challenged here is indispensable to the performance of essential public services that directly benefit Reynolds.

2. Imposition of a nondiscriminatory property tax on goods imported and stored for use in domestic manufacturing operations does not in any manner conflict with federal statutory regulation of customs bonded warehouses. Nor is the imposition of such a tax inconsistent with Congress's goals in enacting the Warehousing Act. In fact, preemption of this tax would undermine Congress's principal purpose in that Act of aiding American businesses.

3. This Court's holding in *Xerox Corp. v. County of Harris, Texas*, 459 U.S. 145 (1982), does not control the result in this case. *Xerox* ruled that imposing local property taxes on imported goods held in customs bonded warehouses pending re-export was inconsistent with the objectives of the Warehousing Act of 1846. The Court's decision was limited to the question presented on the facts before it, and, indeed, its rationale dictates a contrary result in the very different situation of goods imported for domestic manufacture or sale.

4. The statutory exemption from state taxes granted by the Trade and Tariff Act of 1984 to merchandise in

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more than one-half of all city tax revenue. Advisory Commission on Intergovernmental Relations, *Significant Features of Fiscal Federalism* 47 (1985-86). In North Carolina, property taxes accounted for 78.9% of all local tax revenues. *Id.* at 58.



foreign trade zones does not establish congressional intent similarly to exempt imported goods stored in customs bonded warehouses for use in this country. The 1984 legislative history of the tax exemption for goods in foreign trade zones cannot illuminate the intent of Congress nearly 140 years earlier in authorizing the deferral of customs duties for different, albeit related, purposes.

5. Neither the Import-Export Clause nor the Due Process Clause precludes the imposition of the nondiscriminatory personal property tax at issue in this case. The imported tobacco stored by Reynolds in its customs bonded warehouses is no longer in foreign commerce, but has come to rest within the State, where it receives substantial services financed by the property tax.

## ARGUMENT

### I. CONGRESS HAS NOT PREEMPTED THE IMPOSITION OF A NONDISCRIMINATORY PERSONAL PROPERTY TAX ON IMPORTED GOODS STORED IN CUSTOMS BONDED WAREHOUSES FOR DOMESTIC USE.

Preemption analysis must begin with the recognition that " '[t]he exercise of federal supremacy is not lightly to be presumed.' " *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 413 (1973), *quoting Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952). When a claim of preemption is leveled at state legislation involving "vital state interests" (*De Canas v. Bica*, 424 U.S. 351, 357 (1976)), or "traditiona[l]" state prerogatives (*Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)), this Court has taken special care to ensure that " 'the federal-state balance' . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Ibid.* Such special care is particularly appropriate when preemption is claimed concerning the exercise of a state power as fundamental as the power to tax.

The Counties rely on the revenue from the challenged tax to pay for essential governmental services, including police and fire protection of Reynolds' extensive inventories of imported tobacco stored in sixty-two customs bonded warehouses in Forsyth County and in twenty-six such warehouses in Durham County. These facts are fundamentally important for two reasons.

First, the power of state and local governments to impose taxes such as those involved in this case is crucial to state sovereignty. The functioning of our constitutional system depends upon a proper respect for the allocation of power between the federal government and the free and sovereign States.[4] State sovereignty depends in turn upon economic self-sufficiency.[5] And the States' power to raise revenue through the imposition of taxes is the cornerstone of economic independence.

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[4] "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. 700, 725 (1869). *See The Federalist* No. 17, at 118, 120 (A. Hamilton); No. 39, at 245-46 (J. Madison); No. 45, at 292-93 (J. Madison); No. 46, at 294-95 (J. Madison); and No. 51, at 323 (J. Madison). All page citations to *The Federalist* are to the Mentor edition (1961).

[5] In *The Federalist* No. 32, Hamilton stressed that the Constitution protected the States from federal control of the financing of state government:

> I am willing here to allow, in its full extent, the justness of the reasoning which requires that *the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants.* And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of its Constitution.

*Id.* at 197-98 (emphasis added). As we show in Part II, *infra*, the state taxes at issue here do not constitute "duties on imports and exports," and thus do not fall within the "sole exception" that Hamilton recognized.



Second, should Reynolds' challenge prevail, Reynolds will receive the benefit of vital and costly governmental services without paying for them. The Counties would be forced to provide such services—which directly and significantly benefit Reynolds—at the expense of other taxpayers.[6]

Thus, preemption of the personal property tax in this case would seriously impinge upon a fundamental attribute of state sovereignty and would encroach upon the efforts of the taxing authorities to allocate fairly the costs of governmental services among those who receive the benefits of such services. This Court should not conclude that Congress intended to achieve such an extraordinary result absent clear and convincing evidence.

### A. There Is No Conflict Between North Carolina's Property Tax And The Objectives Of Federal Customs Law.

Reynolds claims to discern from federal statutory regulation of customs bonded warehouses an intent by Congress to preempt the tax involved in this case. The limited bases upon which this Court will recognize preemption of state law by congressional act were recently summarized in *Louisiana Public Service Comm'n v. FCC*, No. 84-871, slip op. at 12 (U.S. May 27, 1986): (1) "when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law"; (2) "when there is outright or actual conflict between federal and state law"; (3) "where compliance with both federal and state law is in effect physically impossible"; (4) "where there is implicit in federal law a barrier to state regulation"; (5) "where Congress has legislated comprehensively, thus

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[6] As a practical matter, the Counties probably could not withhold police and fire protection from Reynolds' property without occasioning threats to the safety of the general public.

occupying an entire field of regulation and leaving no room for the States to supplement federal law"; or (6) "where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress."

In this case, the applicable federal law nowhere expressly precludes state taxation of goods imported for domestic use that are stored in customs bonded warehouses.[7] Congress has expressly provided only that when imported goods are stored in customs bonded warehouses no federal customs duties shall be assessed against such goods if they are re-exported, and that if such goods are imported for domestic use, the duties will be deferred until they are withdrawn from storage. 19 U.S.C. § 1557(a) (1982).[8] The North Carolina tax does nothing to deny Reynolds the full benefit of this statute. To paraphrase *Louisiana Public Service Comm'n*, there is (1) no express preemptive intent; (2) no outright conflict between state and federal law; (3) no physical impossibility of compliance with both laws, and (4) no implicit barrier to state regulation.

Reynolds, therefore, is left with but two arguments: that Congress's regulation of customs bonded warehouses is so comprehensive as to leave no room for state regulation; or that the North Carolina tax stands as an obstacle to the accomplishment and execution of Congress's full objectives. However, because federal regulation of Reynolds' customs bonded warehouses is not comprehensive, but is limited, as a practical matter, to ensuring that the imported tobacco will not be withdrawn

[7] By contrast, Congress has explicitly exempted goods in foreign trade zones from state and local property taxes. See pp. 14-17, *infra*.

[8] The length of time for which duties may be deferred by storing imported goods in a customs bonded warehouse has been repeatedly extended by Congress, and is now five years. Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, § 108(b)(1), 92 Stat. 892.



without payment of the deferred customs duty,[9] Reynolds can realistically attempt to demonstrate preemption of the North Carolina nondiscriminatory property tax only by showing that imposition of that tax would frustrate the attainment of Congress's goals. Reynolds has failed to make the required showing.

Relying upon the legislative history of the Warehousing Act of 1846, ch. 84, 9 Stat. 53, a predecessor of the current statute, Reynolds maintains that Congress determined to defer payment of duties on goods imported for domestic use in order to stimulate trade in such goods, to promote their storage here, and to encourage the owners of those goods to delay selling them until market conditions were favorable, rather than force distress sales—to the detriment of American competitors—occasioned by the need for immediate payment of import duties. See Appendix to Brief for Appellant ("Appx. to Br.") 13a, 20a. Reynolds has received the benefit of the deferral of federal customs duties that the statute permits. Reynolds' contention, then, is that the incremental burden of the State's tax will thwart Congress's aim to encourage the importation, storage, and nondisruptive sale of foreign-made goods. This claim is speculative and unrealistic, and belied by Reynolds' own conduct.

Before this Court's decision in *Xerox Corp. v. County of Harris, Texas*, 459 U.S. 145 (1982), Reynolds established and used private customs bonded warehouses to store its imported tobacco, withdrawing it at suitable times for use in its domestic manufacturing operations. Throughout this period, Reynolds paid without protest the property taxes assessed by the Counties. See J.A. 53-54. Reynolds' actions are eloquent testimony that Congress's limited inducement to establish and use customs bonded warehouses for goods imported for domestic use has been fully effective without encroachment on state taxing prerogatives.

[9] See J.A. 56, 58, 60, 62, 64, 66-74, 77-79, 82.

Reynolds' actions illustrate that those who import goods for use in this country, unlike merchants who import goods for resale abroad, have a business purpose for bringing them here. Importers of goods to be used here may be attracted by American markets or by American production facilities. These business purposes will, in the main, be served best if the goods that will be marketed or manufactured here are kept close to market or to production facilities (*i.e.*, stored in this country) and withdrawn when the market is most favorable or when the goods are needed for manufacture. Thus, in the present case, for example, Reynolds' storage of imported tobacco in its own customs bonded warehouses is an integral part of its manufacturing operations. Reynolds ages that tobacco in its warehouses, in the same manner as its domestically grown tobacco, and moves it to its nearby manufacturing plants as needed to be blended with domestic tobacco into cigarettes and other products.

Like Reynolds, other importers of goods for domestic sale or manufacture need no greater encouragement to ship their goods to this country, store them here for sale or use, and withdraw them without market disruption than Congress provided by postponing collection of customs duties on such goods until they are withdrawn from storage. Under these circumstances, nondiscriminatory state and local property taxes imposed on such goods pose no significant barrier to the accomplishment of Congress's objectives. This is especially true where, as here, the goods receive valuable governmental services, including police and fire protection, in return for such taxes. Thus, Reynolds cannot credibly claim that the Counties' collection of the tax in question will frustrate attainment of Congress's objectives in enacting the Warehousing Act, even as Reynolds perceives those objectives.

Moreover, Reynolds' claim must fail for a more fundamental reason. Reynolds' parsing of the legislative history misses the forest for the trees. Reynolds stresses



subsidiary purposes of the Warehousing Act, disregarding Congress's overarching objective: "to stimulate business for *American* industry and work for *Americans*." *Xerox*, 459 U.S. at 151 (emphasis added). In pursuit of that goal, the Warehousing Act imposed no customs duties whatever on imported goods destined for foreign markets. It is with respect to such goods that the Court, in *Xerox*, found congressional intent to preempt state and local taxes.

This basic congressional aim of furthering American business interests would, however, be frustrated, rather than advanced, by the preemption of nondiscriminatory state and local property taxes on goods intended for domestic use. Preemption of such taxes on imported goods that will be sold in this country would confer an unfair advantage on the producers of such goods *vis-a-vis* American producers of competing goods that are subject to tax here. It is patently untenable that Congress, in seeking to foster American business interests, intended to imply a result calculated to disadvantage those very interests.

### B. *Xerox Corp. v. County of Harris, Texas* Does Not Control This Case.

Reynolds' reliance on *Xerox* to support preemption in this case is misplaced. The issue in *Xerox*, and thus the holding of that case, was limited to "whether a state may impose nondiscriminatory ad valorem personal property taxes on imported goods stored under bond in a customs warehouse and *destined for foreign markets*." 459 U.S. at 146 (emphasis added). Moreover, the Court's rationale reflects considerations very different from those determinative of the case at bar.

Reynolds seizes upon some language in the *Xerox* opinion that would arguably support the broader ruling that it now asks the Court to make. But as this Court has cautioned:

> Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, . . . do not alter the limited nature of the function of this Court when state taxes come before it. . . . We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize.

*Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 445 (1940).

A fair reading of the *Xerox* opinion discloses that the Court was concerned specifically with the storage of imported goods destined for re-export. Thus, the Court relied solely upon cases involving imported goods that were not intended for domestic use (*McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940); and *District of Columbia v. International Distributing Corp.*, 331 F.2d 817 (D.C. Cir. 1964)). The Court did not even refer to the more recent decision in *American Smelting & Refining Co. v. County of Contra Costa*, 271 Cal. App.2d 437, 77 Cal. Rptr. 570 (1969), *appeal dismissed*, 396 U.S. 273 (1970), which considered directly the question whether local property taxes could be levied on imported goods held in customs bonded warehouses for domestic use, even though all the parties in *Xerox* had discussed the case.[10] In *American Smelting & Refining Co.*, the California court acknowledged that Congress had preempted State taxation of imported goods intended for export, but held that preemption did not extend to goods that had reached their domestic destination.[11]

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[10] *Xerox Corp. v. County of Harris, Texas*, No. 81-1489, Brief for Appellant 19; Brief for Appellee County of Harris 31-33; Brief for Appellee City of Houston 22.

[11] Reynolds argues (Appellant's Br. 24-26) that extension of the holding in *Xerox* is necessary to preserve the importer's flexibility in deciding whether goods stored in customs bonded warehouses will be re-exported or used or sold abroad. The importer's hypothetical need for flexibility need not concern the Court in this case, because Reynolds' imported tobacco is concededly warehoused exclusively for domestic use. *Id.* at 4 n.1.

In an actual case of "mixed" storage (*i.e.*, storage of goods imported in part for export and in part for domestic sale or use), there may or may not be uncertainty concerning the intended destination of particular goods. If there were any uncertainty, it could be readily resolved by a refund of taxes assessed on property which is re-exported, just as Reynolds' receives a "drawback" of import duties paid on tobacco used in finished products which are later exported. *Id.* at 23. At most, the collection (not the assessment) of state taxes should be deferred until the goods are removed for domestic use. *See* note 13, *infra*.



Nor is such preemption justified by the *Xerox* opinion's view of the congressional purposes of the Warehousing Act of 1846. By that Act, as the Court recognized, Congress was anxious to capture for American shipping interests the "transshipment of goods within the Western Hemisphere and across both the Atlantic and the Pacific." *Id.* at 151. The Court observed that Congress hoped to achieve its ends by adopting a scheme that would "allo[w] goods *in transit in foreign commerce* to remain in secure storage, duty free, until they resumed their journey in export." *Id.* at 150 (emphasis added). A complete exemption from customs duties with respect to goods imported for reshipment abroad was essential to achieve Congress's objective "to encourage merchants here and abroad to make use of American ports." *Id.* at 151. The owners of foreign goods with foreign destinations had no particular business reason for using American ships for transportation, or American ports for storage during transshipment, other than competitive cost inducements. Therefore, imposition of customs duties on these goods during interim storage might have diverted the carrying trade to other nations that did not impose such costs. Against this background, this Court concluded that Congress had in-

tended to preclude the imposition of state taxes on imported goods *destined for foreign markets* "while they were lodged temporarily in Government-regulated bonded storage in this country." *Ibid.*

By contrast, those who import goods for domestic use typically have compelling business reasons for storing such goods here, and need no special inducements to use American markets or facilities. One can only conjecture that the imposition of nondiscriminatory state and local personal property taxes will discourage such use, and mere conjecture is an insufficient ground for preempting state taxing authority.

Further, preemption of state and local personal property taxes on goods destined for *foreign* markets—as contrasted with preemption of state taxes on goods that will be sold in this country—will not disturb pricing structures in American markets where American producers of similar goods must compete. Thus, preemption in the circumstances considered in *Xerox*, unlike the facts here, bears some relationship to Congress's basic goal of furthering American business interests. Preemption here, on the other hand, would undermine that congressional purpose by conferring an unwarranted competitive advantage on importers over American producers and manufacturers.

### C. The Trade And Tariff Act Of 1984 Lends No Support To Reynolds' Preemption Claim.

Contrary to Reynolds' contention, Congress's express preemption of state taxes on goods located within foreign trade zones does not support a holding of preemption in this case. Congress's intent in enacting the Trade and Tariff Act of 1984 can shed no light on Congress's intent, more than a century earlier, in enacting the legislation applicable to customs bonded warehouses. As this Court has noted, evaluation of post-enactment legislative history



"begin[s] with the oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (citations omitted); *see Weinberger v. Rossi*, 456 U.S. 25, 35 (1982).

Differences between foreign trade zones and customs bonded warehouses justify different legislative judgments regarding preemption of state and local taxes. Customs bonded warehouses must "be used solely for the storage of imported merchandise," with limited exceptions. 19 U.S.C. § 1555 (1982). By contrast, in the case of foreign trade zones, "[f]oreign and domestic merchandise of every description . . . may . . . be brought into [such] a zone and may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured . . . ." 19 U.S.C. § 81c(a) (1982). The activities occurring in foreign trade zones themselves further *domestic* business interests. Thus, in acting to preempt state taxes on goods located in foreign trade zones, Congress sought to benefit American business by encouraging the use of such zones. As Senator Bentsen explained:

> Foreign trade zones create U.S. jobs, jobs that would otherwise be performed by foreign workers. The national economy directly benefits from the creation of these jobs, and from the capital investment created by the expansion of foreign trade zones.

129 Cong. Rec. S7748 (daily ed. June 6, 1983).

Further, in acting to preempt state taxes on property located within foreign trade zones, Congress expressly noted that it was "unaware of any states or localities outside the State of Texas that [sought] to impose property taxes on tangible personnel [sic] property located in foreign trade zones. . . ." S. Rep. No. 308, 98th Cong., 1st Sess. 37 (1983), *reprinted in* Appendix to Juris. State-

ment ("J.S. App.") 59a.[12] And, in practice, there had been "very little, if any, actual taxation of inventories located in foreign trade zones" even in Texas. 129 Cong. Rec. S7748 (daily ed. June 6, 1983) (remarks of Senator Bentsen). Concerned that Texas might be disadvantaged in competing for foreign trade zone business because of "the threat of taxation" unique to that State, the Senators *from that State* sought enactment of legislation expressly preempting state taxation of property located within a foreign trade zone. *Ibid.* As Senator Bentsen explained, "[t]he Bentsen-Tower bill addresses a very narrow problem dealing with foreign trade zones in the State of Texas." *Ibid.* He continued: "We have found that businesses are being discouraged from locating in Texas foreign trade zones because of a Texas constitutional quirk that leaves uncertain the possibility that their inventories, while in foreign commerce, would be subject to *ad valorem* tax assessment by local authorities." *Ibid.* Thus, the interests that entered into Congress's judgment in enacting the 1984 legislation were very different from those that bear on this case.

Finally, the Trade and Tariff Act of 1984 teaches that when Congress wishes to preempt state taxing authority it knows how to do so expressly. Congress did not extend the explicit preemption of state and local taxes in foreign trade zones to goods stored in customs bonded warehouses. Therefore, what Congress did in enacting that law provides no basis for an inference that it intended to do something else as well.

Accordingly, Reynolds' claim that Congress's regulation of customs bonded warehouses preempts the Counties'

[12] The Texas state constitution contained an impediment to exempting goods in foreign trade zones from state taxation. The North Carolina property tax at issue here provides such an exemption. N.C. Gen. Stat. § 105-275(23).



collection of taxes on goods imported concededly for use within the State must fail.[13]

## II. THE IMPORT-EXPORT CLAUSE DOES NOT PROHIBIT IMPOSITION OF A NONDISCRIMINATORY PERSONAL PROPERTY TAX ON GOODS STORED IN PRIVATE CUSTOMS BONDED WAREHOUSES AWAITING DOMESTIC USE.

This Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 286 (1976), made unmistakably clear that "[n]othing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax . . . imposed on imported goods that are no longer in import transit was the type of exaction that was regarded as objectionable by the Framers of the Constitution." Reynolds insists nonetheless that the Counties were prohibited by the Import-Export Clause from taxing Reynolds' imported tobacco because such tobacco was still in transit.

In *Michelin*, this Court abandoned the discredited "original package" doctrine, and held that the Import-

[13] It bears pointing out that under *no* construction of the warehousing statute or its legislative history would Reynolds be entitled to a holding that Congress had barred imposition *at any time* of state taxes on goods imported for domestic use. Congress saw fit to *defer* the collection of customs duties until the goods were withdrawn for domestic use; Congress did not *waive* all duties outright. Even if the state tax were thought to interfere with Congress's purposes in deferring customs duties—although, as we have shown, nothing in the language of the statute requires this, and achievement of Congress's goals does not depend upon it—then at most Reynolds might be entitled to defer payment of the property tax assessed on the imported tobacco until it is withdrawn from the warehouse for use in its domestic manufacturing operations. Even if Congress had any intent to affect the collection of state taxes, it could not have thought *preclusion* of state taxes was necessary when it provided only for *deferral* of federal taxes. Because this case concerns the 1983 assessment, and the imported tobacco remains in storage for an average of only two years, the taxes at issue in this case would long since have fallen due even under this theory.

Export Clause did not prohibit the imposition of a nondiscriminatory local property tax on imported goods that were "no longer in transit." The Court found it "obvious that such nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce . . ." (423 U.S. at 286).[14] Significantly, the Court noted that "to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed." *Id.* at 290.

In *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 358 (1984), the Court described the broad sweep of the *Michelin* decision:

> It found that in the history of the Import-Export Clause, there was nothing to suggest that a tax of the kind imposed on goods that were no longer in import transit was the type of exaction that was regarded as objectionable by the Framers. The tax could not affect the Federal Government's exclusive regulation of foreign commerce since it did not fall on imports as such. Neither did the tax interfere with the free flow of imported goods among the States. The Clause, while not specifically excepting nondiscriminatory taxes that had some impact on imports, was not couched in terms of a broad prohibition of every tax, but prohibited States only from laying "Imposts or Duties," which historically connoted exactions directed only at imports or commercial activities as such.

[14] The Court noted that "property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth; there is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods." 423 U.S. at 287.



Reynolds imported the tobacco in question for use in its manufacturing operations, which take place in Winston-Salem, North Carolina. J.S. App. 6a-7a, 28a, 31a. Storage of the tobacco in and of itself was integral to the production process because the tobacco required proper aging. *Id.* at 31a; J.A. 74, 82. Reynolds' imported tobacco was treated, for all practical purposes, in the same way as Reynolds' domestically grown tobacco, except that the imported tobacco was stored separately in customs bonded warehouses in order to qualify for deferral of federal customs duties. J.S. App. 15a. Thus, Reynolds' imported tobacco stored in its customs bonded warehouses was no more "in transit through the State," *Michelin*, 423 U.S. at 290, than Reynolds' domestically grown tobacco, which was concededly subject to the state tax.

## III. THE DUE PROCESS CLAUSE DOES NOT PROHIBIT IMPOSITION OF A NONDISCRIMINATORY PERSONAL PROPERTY TAX ON IMPORTED GOODS THAT HAVE COME TO REST WITHIN THE STATE.

It is well settled that a state tax may be imposed consistent with the Due Process Clause of the Constitution when "the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). Reynolds does not dispute that the taxes in question satisfy this standard. Reynolds maintains, however, that the Counties cannot tax Reynolds' imported tobacco consistent with the Due Process Clause because that tobacco was outside their jurisdiction while it was stored in customs bonded warehouses.[15]

As described, Reynolds stored its imported tobacco in its privately owned customs bonded warehouses located within the Counties that are appellees here. This tobacco

[15] Reynolds' argument might have some force with respect to foreign trade zones, where the regulations specifically provide that

would have been *outside* the taxing jurisdiction of the Counties only if the statutory regulation of Reynolds' customs bonded warehouses made it so. As we have shown, Congress has nowhere evinced an intent to insulate from nondiscriminatory state and local personal property taxes goods imported for domestic use and temporarily stored in customs bonded warehouses.[16]

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the zones are outside the customs territory of the United States. 19 C.F.R. § 146.1(c) (1985). But Reynolds points to no provisions of the statute or regulations suggesting that customs bonded warehouses are deemed to be outside the territory of the State in which they are located. In fact, Reynolds pays state taxes on the warehouses themselves without protest. Appellant's Br. 4 n.2.

[16] The decisions upon which Reynolds relies to argue that goods stored in customs bonded warehouses are not subject to state taxation do not stand for this proposition. *Fabbri v. Murphy*, 95 U.S. 191 (1877), held simply that the taxpayer's goods in that case were properly subject to certain federal duties upon withdrawal from storage under the terms of the applicable federal statute. The case had nothing to do with state taxing authority. In *District of Columbia v. International Distributing Corp.*, 331 F.2d 817 (D.C. Cir. 1964), the District of Columbia Circuit held that a wholesaler of imported alcoholic beverages was not liable for District of Columbia excise tax on the sale of such beverages to foreign embassies and international organizations because "[r]eciprocity or comity in allowing diplomatic personnel to import goods duty-free and tax-free for their own use has long been traditional in international law and relations, and has been recognized by Congress." *Id.* at 820. No such doctrine applies here. The Court in *Ammex Warehouse Co. v. Department of Alcoholic Beverage Control*, 224 F.Supp. 546 (S.D. Cal. 1963), *aff'd mem.*, 378 U.S. 124 (1964), held that California could not prevent the sale of bonded liquor imported exclusively for re-export. The opinion nowhere addressed the States' authority to tax goods in storage awaiting domestic use.



## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the North Carolina court.

Respectfully submitted,

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